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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 275

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, Trustee,

Petitioners,

vs.

SUNKIST GROWERS, INC., a corporation, and EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM C. DIXON,
417 South Hill Street,
Los Angeles, California,
HOLMES BALDRIDGE,
77 West Washington Street,
Chicago, Illinois,
Attorneys for Petitioners.

Of Counsel:
HARRY M. IRWIN.
215 West Fifth Street,
Los Angeles, California,
Attorney for Trustee Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review that part of the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on September 30, 1960, which reversed the judgment of the trial court entered upon a jury verdict with respect to the amount of damages awarded.

Opinion Below.

The judgment of the District Court entered upon the jury's verdict [R. 330-339][1] is unreported. The opinion

[1] All record references are to the pages of the "Transcript of Record" printed for use in the court below. To this "Transcript of Record", consisting of nine volumes, has been added a tenth volume which includes the proceedings in the court below. This transcript, as well as the original exhibits in the case, has been certified by the Clerk of the court below, and transmitted to the Clerk of this Court pursuant to Rule 21 of this Court [R. ....] by petitioners herein and by appellant below who have also secured a stay of the mandate of the Court of Appeals pending the ruling of a petition for a writ of certiorari.

of the Court of Appeals for the Ninth Circuit (App. A, *infra*, pp. 1-69), is reported at 284 F. 2d 1. By order dated May 5, 1961, the Court of Appeals modified its opinion in certain particulars. (App. C, *infra*, pp. 71-72.)

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1960. (App. B, *infra*, p. 70.) Timely petitions for rehearing by both appellees below[2] (petitioners herein) and appellants below were filed, and denied on May 5, 1961. (App. C, *infra*, pp. 71-72.) The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Whether a private suitor for treble damages under the antitrust laws has been deprived of its constitutional right to a jury trial by the action of an appellate court in substituting its judgment for that of the jury on the issue of the amount of damages awarded after such court has affirmed the judgment of the jury on the issue of liability, including the fact of damage, but has reversed on the issue of the amount of damages, when there was substantial evidence in the record to support the jury finding with respect to the amount of damages.

2. Whether an appellate court may "presume" that the trial court's exclusion of certain evidence offered on the issue of the amount of damages was prejudicial and hence must have affected the jury's verdict with

[2]Appellees below (petitioners herein) sought a rehearing *en banc*, which was rejected by the panel which decided the appeal. (App. C, *infra*, pp. 71-72.)

respect to the amount of damages awarded, merely because such appellate court "believed," without stating any reasons therefor for the guidance of the trial court on the retrial of such issue, that such exclusion denied defendants an opportunity to present their defense on such issue.[3]

Statutes Involved.

1. Section 1 of the Sherman Act, as amended, 26 Stat. 209, 50 Stat. 693, 15 U. S. C. §1, provides in pertinent part:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. * * * "

2. Section 2 of the Sherman Act, 26 Stat. 209, 15 U. S. C. §2, provides in pertinent part:

> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor * * * "

3. Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. §15, provides:

> "Sec. 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in

[3] If certiorari should be granted to review the decision below on the questions raised herein, we reserve the right also to argue whether the court below could find clear prejudicial error on an issue of causation and amount of damage on the basis of the exclusion of evidence which was never offered.

any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee."

Statement.

This suit was filed by petitioners under Section 4 of the Clayton Act (15 U. S. C. §15) to recover damages from respondents for alleged violations of Sections 1 and 2 of the Sherman Antitrust Act. (15 U. S. C. §§1, 2.) In general the complaint charged that respondents, Sunkist Growers, Inc., the largest citrus fruit marketing organization in the United States, and its wholly owned processing subsidiary, Exchange Orange Products Company, had conspired with two independent processors of canned single strength Valencia orange juice, namely, Treesweet Products Company, and E. A. Silzle Corporation,[4] to eliminate petitioners (which were also engaged in the business of processing and selling such orange juice) from the interstate market in such product. Petitioners were competitors of Sunkist, Treesweet and Silzle in the interstate sale of such juice. It is undisputed that petitioners did not process and sell any of its principal product, single strength Valencia orange juice, during the 1951 processing season.

The gist of the charge was that in 1951 respondents had abused their monopoly control of California product oranges[5] available to independent processors for process-

[4]These two independent processors were named as co-conspirators but not as defendants. [R. 250.]

[5]Product oranges are oranges that are sold for processing into various products, including juice products. [R. 555-556.]

ing into single strength orange juice by making such oranges available to petitioners only at a monopoly controlled price, while making them available to petitioners' competitors, Treesweet and Silzle, at a substantially lower price, and under an arrangement which was denied to petitioners, thus making it impossible for petitioners to process and sell any single strength orange juice, their principal product, with resultant damage to petitioners. [R. 265-272.]

The evidence showed that in 1951, the critical year, respondents controlled approximately 70 percent of the total supply of product oranges in the California-Arizona area. [R. 688, 1582; Exs. 72, 75, CF.] The remaining 30 percent was scattered among three concerns which had processing facilities of their own and hence had no product oranges available for sale to others [R. 680-689; 1578-1580], and a packing and shipping association which had no processing facilities [R. 1595], and hence either sold its oranges to processors or entered into various types of processing contracts with them. [R. 1589-1596.]

In 1951 the product orange crop was the largest in respondents' history [R. 3045; 3046; Ex. FD], totaling approximately 318,000 tons. [R. 541.] This tonnage was disposed of in the following manner: Respondents processed approximately 195,200 tons with their own facilities [R. 541][8] sold approximately 47,000 tons to processors for manufacture into frozen con-

[8]Of this total, 164,000 tons was processed by Exchange Orange Products Company, and 31,200 tons was processed by Exchange Lemon Products Company. [R. 541.] Exchange Lemon Products Company, a part of the system of Sunkist Growers, Inc. [R. 555], was named as a co-conspirator but not as a defendant. [R. 255.]

centrate [R. 541]; and made fruit purchasing and processing contracts with other processors for conversion of approximately 45,000 tons into hot and frozen concentrate for the account of respondents. [Exs. 15, 17, 18, 19, EC.] This left approximately 31,000 tons available for sale to independent processors for conversion into canned single strength orange juice. Respondents' processing facilities were not sufficient to handle this tonnage. [R. 2964-2970.]

There were four independent processors in the California-Arizona area in 1951 who were engaged primarily in the business of processing and selling canned single strength orange juice, and who were dependent upon others, chiefly the respondents, for their source of supply of product oranges with which to manufacture such juice. These independents were Treesweet Products Company and E. A. Silzle Corporation, named as co-conspirators in the complaint, Case-Swayne Company, and petitioners. [R. 540, 906, 947, 1004.] Each of these processors was in competition with each of the other three,[7] and all four competed directly with respondents in the manufacture and sale of canned single strength orange juice in interstate commerce. [R. 744, 773-774; 885; 1479-1480.] Petitioners had been a regular customer of respondents in the purchase of product oranges for processing into single strength juice since their organization in 1946. [R. 649, 1005-1006, 1011, 1044-1045, 1441.] Neither Treesweet nor Silzle

[7] Treesweet sold in the national market under its own label. [R. 908.] Silzle sold in the national market to private label buyers. [R. 2989, 3004.] Case-Swayne sold largely in California and on the West Coast under its own label. [R. 2969.] Petitioners sold in the national market under their own label. [R. 908; Ex. 38.]

nor Case-Swayne had been a regular customer of respondents in the purchase of oranges for manufacture into single strength juice. [R. 929; 948-950; 640; 2289-2290.] Respondents stated that in 1951 it was their desire and intention to deal fairly with all of the independents in the disposition of their (respondents') surplus product oranges. [R. 782.]

In April 1951, respondents set a selling price of $40 per ton on product oranges having a soluble solids content of 120 pounds per ton [Ex. 5],[8] and circulated such selling price to the trade [R. 623-624],[9] including petitioners. [R. 1044; Ex. 42.] This price list remained unchanged throughout the year 1951 although this was not the usual situation. [R. 625; 655.]

Respondents were unable to sell any of the 31,000 ton surplus available for processing into single strength juice at the $40 price. [R. 862-863, 2950.][10] They disposed of this surplus by entering into processing contracts with Treesweet and Silzle [Exs. 20, 25], under which Treesweet processed 24,148 tons [R. 775], and Silzle processed 6,675 tons [Ex. 66A]; offered a similar processing contract to Case-Swayne which was de-

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[8]The term "soluble solids" is descriptive of the constituent elements, inside the orange other than water, such as citric acid, sugar, and other dissolved solids. [R. 571-572.] The prices of oranges varied with the soluble solids content. They ranged from $17 per ton for fruit having 60 pounds of soluble solids to $51.50 per ton for oranges containing 150 pounds of soluble solids. Most of the fruit with which this case is concerned ranged from 120 to 130 pounds per ton of soluble solids, or from $40 to $46.13 per ton. [R. 928, 1969, Ex. 5.]

[9]Respondents did not send Treesweet a copy of their 1951 price list. [R. 917-918.]

[10]The processors which purchased oranges for conversion into hot and frozen concentrate could pay the $40 price and still make a profit on the concentrate. [R. 2971-2972.]

clined,[11] but refused petitioners' repeated timely requests for a similar contract or for oranges at a price which would permit petitioners to process and sell canned single strength orange juice at prices which would be competitive with the prices at which Treesweet, Silzle and Sunkist were selling such juice.

Throughout the 1951 season respondents never refused to sell oranges to petitioners but would sell them only at the $4.0 prices [R. 1058-1084.] Respondents readily conceded that no processor could pay the $4.0 price and process and sell the resultant single strength juice in the interstate market at prices which would be competitive with the prices at which Treesweet, Silzle and respondents were selling such juice. [R. 862-863.] Respondents also stated categorically that they would never, under any circumstances, give petitioners the same type of contract that they made with Treesweet in 1951. [R. 3066.] Respondents admitted that other processors to whom they had sold oranges complained to respondents that petitioners were price-cutters in the sale of single-strength orange juice [R. 648]; and that petitioners' prices on such juice were uniformly quoted below respondents' prices. [R. 889.]

Under the contract between Treesweet and respondents [Ex. 20], the latter made oranges available to Treesweet on a consignment basis, paid Treesweet its

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[11] At the time respondents offered a processing contract to Case-Swayne that company had already committed its processing facilities to making vegetable juices, and single strength orange juice on a contract basis for the Independent Citrus Growers and Shippers Association. [R. 2272-2274, 2278-2280, 2284, 2287, 2290-2293.]

processing costs at ...ified rates, as well as the trucking cost of the fruit to Treesweet's plant. As of the date it sold the single strength juice, Treesweet purchased such juice at respondents' published selling price for such juice as of such date of sale, less discounts and allowances of 15 percent therefrom, plus an advertising allowance of 7¢ per case. Treesweet did not have to pay for the juice until it was sold. The oil and peel extracted from the processed oranges were to remain the property of respondents. Respondents admitted that such contract guaranteed Treesweet against any inventory losses in the market price for canned single strength orange juice during both the selling and carryover seasons [R. 3054], and that Treesweet was guaranteed a profit thereunder and couldn't lose under such a contract. [R. 840.]

The contract provided, in effect, that respondents were to be paid for their product oranges on the basis of the difference between the amount credited to Treesweet for processing such fruit and the price which Treesweet paid respondents for the processed juice. [R. 756.] On this basis Treesweet was credited with $859,004.00 for processing the 24,148 tons of oranges, and paid respondents $1,024,031.41 for the juice processed therefrom. The difference, to wit, $345,027.41, was the amount Treesweet actually paid respondents for such tonnage, or at the rate of $14.29 per ton without the peel and oil. The net return on the peel and oil which was reserved to respondents was $10.81 per ton. [Ex. 67.] Respondents thus received $25.10 per ton for oranges processed under the Treesweet contract, or a price which was $19.12 per ton less than

respondents' published selling price for oranges of the same quality available to petitioners.[12]

Respondents made a similar contract with Silzle [Ex. 25],[13] under which they realized only $17.00 per ton for oranges of 120 pounds soluble solids,[14] including the return on the peel and oil [Ex. 6-A], or $20.42 less per ton than respondents' published selling price for oranges of similar grade and quality, namely, $40 per ton. [Ex. 5.]

Respondents' selling prices on the 12 46 oz. family size case[15] of canned single strength orange juice in 1951, ranged from $2.50 to $2.80 in the California-Arizona area, and from $2.20 to $2.50 per case in all other areas. [R. 815-819; Exs. 27, 28.] Treesweet's selling prices for such single strength juice in 1951 were the same as those of respondents. [R. 918-919; Exs. 27, 30.] Silzle's selling prices were substantially the same as those of respondents. [R. 986-987, 2952-2954.]

Respondents conceded that under normal use of processing facilities it would cost approximately $3.08 to produce a case of 12 46 oz. single strength orange juice with fruit which cost $40 a ton, before any allowance for selling expense and profit, that is, $1.74 per case

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[12]The average soluble solids content of the oranges processed by Treesweet in 1951 under its contract with respondents was 131.6 pounds per ton. [R. 928.] Respondents' 1951 selling price for product oranges having 131.6 pounds of soluble solids per ton was $44.22 per ton. [Ex. 5.]

[13]The discount allowed Silzle was 12½ percent. [Ex. 25.]

[14]Exhibit 7.

[15]The 12 46 oz. family size accounted for 80 per cent of the pack. [R. 746.]

for the juice and $1.35 per case for manufacturing costs. [R. 745-749.]

Petitioners sought unsuccessfully to secure oranges elsewhere, including an attempt to secure a supply from the Independent Growers and Shippers Association, a source of a part of petitioners' requirements in previous years. Petitioners were unable to secure any oranges from this source except at the $40 price. [R. 1437, 1494-1495, 1573, 1590, 1599.] The Association selling agent explained the reason as follows: He stated that respondents controlled 70 percent of the available fruit and hence set the industry price on product oranges; that the Association, being competitive, had to offer oranges at the same price in order to stay in business [R. 1582]; that few, if any, oranges could be sold at the $40 price set by respondents [R. 1582-1583; 1590]; that in order to dispose of their tonnage the Association was forced to enter into processing contracts [R. 1590]; that respondents already had most of the available processors tied up [R. 1590-1597]; that the Association made a concentrate processing contract with Paramount Citrus Association, an independent processor, which paid the Association on a basis which was substantially below the $40 market price [R. 1595]; that a processing contract was made with Case Swayne for the conversion of 4,000 or 5,000 tons of fruit into single strength juice which was processed for the account of the Association, and for which Case Swayne was paid its costs plus a five percent profit [R. 1592-1593], and a processing contract was made with petitioners for the processing of approximately 5,000 tons of fruit into frozen concentrate, for which petitioners were paid their costs plus a five percent profit [R.

1590; Ex. 55]; that the Association wanted to be fair to both Case-Swayne and petitioners and therefore awarded the frozen contract to petitioners who had frozen facilities and the single strength contract to Case-Swayne which had no frozen facilities; that if the Association had awarded single strength juice contracts to both of these processors the Association would have oranges in canned juice form competing against each other in the market. [R. 1600-1601.]

Petitioners' inability in 1951 to secure oranges from respondents at a price or on any basis which was comparable to the basis upon which respondents made oranges available to petitioners' competitors Treesweet and Silzle, prevented petitioners from processing and selling any single strength orange juice, their principal product, during such year [R. 1005, 1052-1053.] Although petitioners had a line of bank credit in prior years, they were unable to borrow any money because they couldn't produce and sell their principal product. [R. 1089, 1099.] Their operating loss in 1951 was $184,523.20 [Ex. 65].[18] The reason for the loss was $1,000,000 less sales than in 1950. [Exs. 63, 65, R. 1690.]

This operating loss caused petitioners to lose their plant and business. [R. 1089, 1915-1917.] Defaults on installments and interest due under a RFC loan, caused the entire amount to become due under an acceleration clause, and the date of a trustees sale of the plant to be set for Dec. 15, 1951. Attempts to refinance the loan with the RFC and with commercial banks

[18] In 1949, petitioners had an operating profit before taxes of $121,340.00 [Ex. 61], and in 1950 their operating profit before taxes was $40,845.53. [Ex. 63.]

proved fruitless in view of petitioners' inability to secure oranges required for the manufacture of their principal product, canned single strength orange juice. [R. 1089-1090; 1180-1190, 1259-60.] In February, 1952, proceedings were filed to protect the assets of the corporation and for the benefit of creditors and share holders. [R. 1090.] Subsequently, the company's assets were sold under court order for $100, subject to all existing encumbrances, and the rights to petitioners' label were sold for $1,000.00. [R. 1917.]

Petitioners introduced evidence on two principal items of damage, namely, loss of profits, including operating losses, and loss of plant. The plant valuation, made by an independent appraisal firm as of January, 1951, showed a sound or depreciated value in the sum of $662,424.61. [R. 1462-1463; Exs. 39, 51, 63.] This evidence as to value of plant stands unopposed in the record. The book value of the land, buildings, machinery and equipment, furniture and fixtures, as disclosed by petitioners' balance sheet on January 31, 1952, the end of its fiscal year, which used the 1951 appraisal as a base, totaled $699,238.34. [Ex. 65.] The encumbrances on the property at the time of the forced sale totaled approximately $140,000.00. [R. 1917.] Thus, petitioners' loss on the sale of their fixed assets was approximately $559,000.00.

Petitioners president testified that in his opinion petitioners would have made a profit in 1951, assuming normal operations, if they had had access to oranges for processing into its principal product on the same basis as respondents made them available to their competitor, Treesweet. [R. 1093, Ex. 20.] Evidence as to the probable amount of this loss of profit item, was put

into the record by a certified public accountant who had been in charge of petitioners' accounting records continuously since its incorporation [R. 1026-1028], and was calculated as follows: The witness prepared an exhibit [Ex. 69A] which showed that if petitioners had had access to 12,000 additional tons of oranges in 1951 for processing into single strength orange juice, their principal product, on terms comparable to those given by respondents to Treesweet, petitioners would have earned an additional operating income in 1951 of $209,754.65, which additional operating income would have wiped out the operating loss actually sustained by petitioners in 1951 in the sum of $184,523.20 [Ex. 65], and in addition, would have permitted petitioners to earn a profit in such year in the sum of $25,231.45. Under this calculation the total amount lost by petitioners as a result of respondents' refusal to treat petitioners on the same basis as respondents treated Treesweet, (in addition to loss of plant) was $209,754.65, that is, the operating loss actually incurred in the sum of $184,523.20, and loss of profits in the sum of $25,231.45.

The 12,000 ton figure was based upon approximately half of the tonnage which respondents made available to Treesweet in 1951 for the manufacture of single strength orange juice. [R. 775.] Silzle didn't have the plant capacity to handle any more than the 6,675 tons made available to it by respondents. [R. 777.] Petitioners had a plant capacity for processing approximately 25,000 tons of single strength orange juice per

season [R. 1008],[17] and Treesweet's plant capacity was estimated by respondents as capable of processing 100,000 to 125,000 tons per season. [R. 3000.]

The case was submitted to the jury under instructions with respect to which the court below found no reversible error. (App. A, *infra*, pp. 32-50.)[18] In argument to the jury respondents presented all their reasons, based, as they insisted, upon the record evidence, as to why petitioners sustained an operating loss in 1951, which resulted in their loss of plant and business, including the following: the refusal of the Independent Citrus Growers and Shippers Association to make oranges available to petitioners for processing into single strength juice; the lack of sound financing; the Florida competition; the quality of petitioners' product, and petitioners' absence of business experience in the manufacture and sale of citrus juice. [R. 3588-3589, 3660.]

The jury returned a general verdict against respondents and found damages in the sum of $500,000 [R. 295-296], which the trial court trebled and, in addition, allowed attorneys' fees, both pursuant to the provisions of Section 4 of the Clayton Act (15 U. S. C. §15), and entered judgment thereon. [R. 336-339.]

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[17]Petitioners' normal operation required the processing of more than 12,000 tons of oranges per season. [R. 1027-1031.] In 1959, petitioners processed 18,324 tons of raw fruit, of which 12,709 tons were Valencia oranges. [R. 1004, 1027, 1029; Ex. 134.]

[18]The trial court instructed the jury, *inter alia*, on petitioners' contentions [R. 3691-3692, 3694]; on respondents' contentions [R. 3695-3697]; the contracts between respondents and Treesweet and Silzle [R. 3700-3702]; on proximate cause [R. 3686], and on intervening cause. [R. 3721.] Respondents made no objections to the instructions on proximate cause or on intervening cause.

The court below affirmed the jury's determination of the issue of liability, reversed the jury's finding on the amount of damages, and remanded the case for a partial new trial limited to the latter issue. (App. *infra*, p. 69.)

The reversal and remand on the issue of the amount of damages was based upon the following: (1) the exclusion of certain evidence of alleged adulteration of petitioners' product which the court below thought had been offered to prove the existence of dissatisfied users with resultant loss of sales (App., *infra*, p. 59);[19] (2) certain rulings by the trial court which were deemed to be restrictive and hence were "presumed" to be prejudicial, although no reasons for such presumption were stated (App. A, *infra*, pp. 60-63); (3) a finding that it was petitioners' contention that the sole proximate cause of the amount of damage suffered was respondents' refusal to sell petitioners 1.54 percent of their orange requirements and the refusal of other producers to sell a larger percentage (App. A, *infra*, pp. 65-66);[20] (4) a finding that at the time petitioners requested oranges from respondents "the encumbrance on the Winckler & Smith property was in default and a sale on account thereof already set,"[21] thus making the evidence on the loss of plant item collateral, remote and conjectural.

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[19]The trial court invited respondents to offer such evidence [R. 2541], but none was ever offered.

[20]This finding was directly contrary to the pleadings and to all of the evidence offered by petitioners.

[21]This finding was also directly contrary to the evidence. In the order denying petitioners' request for a rehearing *en banc*, the court below corrected this error, in part, by deleting from its opinion the following words "and a sale on account thereof already set." [App. C, *infra*, p. 72; R. 4005.]

(App. A, *infra*, p. 66), and (5) a finding that the evidence bearing upon the loss of profit item of damage rested upon surmise, conjecture, and guess work. (App. A, *infra*, p. 68.)[22]

In view of the importance of the national policy involved in the effective private enforcement of the antitrust laws, and the restrictions placed upon such enforcement by the decision below, as we will now show, review by this Court is plainly warranted.

Reasons for Granting the Writ.

This case presents important issues bearing upon the effective enforcement of the federal antitrust laws. By Section 4 of the Clayton Act (15 U.S.C. §15), Congress has provided for broad enforcement of the public policy embodied in such laws by making the private litigant an ally of the government in their enforcement.[23] The major incentive for private enforcement lies in the possibility of securing damages for competitive wrongs.[24] Decisions which affirm such private suits on the issue of liability but reverse on damages, either upon highly technical or extremely doubtful grounds,[25] whether because the court thinks the jury award of damages is too high,[26] or because it is in

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[22]Such evidence, in fact, was based in part upon petitioners' past profitable operations. See footnote 16, *supra*, p. 12.

[23]51 Cong. Rec. 16319 (1914).

[24]Cong. Rec. 9073 (1914); *Bruce's Juices, Inc. v. American Can Co.*, 330 U. S. 743, 751.

[25]See *The Flintkote Co. v. Lysford*, 246 F. 2d 368 (C. A. 9, 1957); cert. den. 355 U. S. 835; *Standard Oil Co. of Cal. v. Moore*, 251 F. 2d 188 (C.A. 9, 1958), cert. den. 356 U. S. 975.

[26]The Court of Appeals for the Ninth Circuit, sitting *en banc*, has held that it cannot set aside a verdict on the ground that it is excessive. *Southern Pacific Railroad Co. v. Guthra*, 186 F. 2d 926, 932-933 (1951).

the nature of a windfall, discourage the filing of private antitrust suits, thus thwarting the will of Congress.

The instant case provides a particularly aggravated illustration of the methods employed by an Appellate Court to discourge the private enforcement of the antitrust laws. The court below found that respondents had violated the Sherman Act. It also necessarily found that petitioners had been injured by such violation, else it would have simply reversed the case, rather than reverse and order a new trial limited to the determination of the issue of the amount of damages only. The reasons advanced in support of the new trial on the issue of the amount of damages were the following: The exclusion of evidence which was never offered; restrictive rulings of the trial court which the court below "presumed" to be prejudicial but without stating any reasons therefor; the finding of an absence of causation as to the item of plant loss damage by attributing to petitioners a theory of liability which was contrary to the pleadings and contrary to the record evidence; a finding, contrary to the evidence (later corrected in part), that petitioners' plant was already lost at the time they sought oranges from respondents, and a finding, contrary to the record, that petitioners' lost profits item of damage rested upon surmise, conjecture, and guess work, although, in fact, it was in large part based upon past profitable operations.

Such were the reasons which were advanced as a basis for reversing a substantial judgment in favor of a bankrupt company, acquired after weeks of trial, in a case wherein the court held that such bankrupt had been injured by a violation of the antitrust laws. Now, ten years later, such bankrupt is to be compelled to

retry the single issue of the amount of damages sustained by such violation with no guideposts having been provided as to what evidence is admissible or inadmissible on such issue. The decision, if permitted to stand, will necessarily constitute a precedent for trial courts in the Ninth Circuit. As such it can only foster disharmony and create confusion in the trial of private antitrust suits. It leaves the law cloudy and rudderless in an area where an urgent need exists for both clarification and guidance.

I.

The first question presented is whether a private suitor for treble damages under the antitrust laws has been deprived of his constitutional right to a jury trial[27] by the action of an appellate court in substituting its judgment for that of the jury on the issue of the amount of damage awarded after such court has affirmed the judgment of the jury on the issue of liability, including the fact of damage or injury, but has reversed on the issue of the amount of damages, when there was substantial evidence in the record to support the jury finding on all issues relating to damages.

Petitioners are well aware of the reluctance of this Court to consider factual questions unless they are entangled in the proper determination of constitutional or other important legal issues. We believe such issues are presented by the record in the instant case.

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[27] In *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500, 504 (reversing 252 F. 2d 864 (C. A. 9)), this Court held that a private suitor for treble damages under the antitrust laws is entitled to the right to a jury trial on issues which are essentially jury questions, and that such a right "* * * is, in fact an essential part of the Congressional plan for making competition rather than monopoly the rule of trade * * *".

Admittedly, a grant of the writ in this case would require consideration by this Court of a part of the record in the court below. But this Court has frequently granted the writ in cases arising under the Federal Employers' Liability Act (35 Stat. 65, as amended, 53 Stat. 1404, 45 U.S.C. §§51 *et seq.*)[28] and the Jones Act (38 Stat. 1185, 46 U.S.C. §688),[29] and even in a case in which jurisdiction was based solely upon diversity of citizenship,[30] in situations wherein a litigant, in effect, has been deprived of his constitutional right to a jury trial by the action of an appellate court in substituting its judgment for that of the jury on damage questions, both as to the fact of damage and as to the amount, when there was substantial evidence in the record to support the jury's verdict. The courts of appeals had developed an unfriendly or indifferent attitude toward these statutes which was hostile to the Congressional purpose reflected in such legislation. Hence, despite the primarily factual nature of such cases this Court has deemed them to be of sufficient public importance to warrant review on factual issues which were erroneously decided by the courts below. Certiorari was granted in these cases to effectuate the intention of the Congress "* * * to secure the right of a jury determination * * * where it appears the litigants have been improperly deprived of that de-

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[28] *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29; *Lavender v. Kurn*, 327 U. S. 645; *Myers v. Reading Co.*, 331 U. S. 469; *Wilkerson v. McCarthy*, 336 U. S. 53; *Rogers v. Missouri Pac. RR. Co.*, 352 U. S. 500; *Webb v. Illinois Central R.R. Co.*, 352 U. S. 512.

[29] *Senko v. La Crosse Dredging Corp.*, 352 U. S. 370; *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521; *Scutilles v. Inter-Carribbean Corp.*, 361 U. S. 107.

[30] *Dick v. New York Life Ins. Co.*, 359 U. S. 437.

termination." *Rogers v. Missouri Pacific Rd. Co.*, 352 U.S. 500, 509.

It is suggested that the public policy expressed by the Congress in Section 4 of the Clayton Act is no less important than that which gave rise to the passage of the Federal Employers' Liability Act or the Jones Act, and that certiorari should be granted herein to prevent the erosion of Section 4 by "narrow and technical construction." Certainly a private litigant who undertakes the arduous task of assisting his government in the maintenance of our free enterprise business system should not be deprived of his right to a jury determination of purely factual issues merely because a reviewing court takes a different view of such facts, when there is substantial evidence in the record to sustain the jury's verdict. To defeat a claim under such circumstances, and to deprive a litigant of the fruits of his victory, is to discourage, and eventually to foreclose, the private enforcement of the antitrust laws. It is submitted that such a litigant should not be placed in a less favorable status than an employee of a railroad or of a steamship line who has suffered injury and damage because of the negligence of his employer.

The court below substituted its judgment for that of the jury on several purely factual issues upon each of which there was substantial evidence in the record to support the jury's verdict. One such instance relates to the proof of the amount of the loss of profits item of damage. The court below held that petitioners' evidence with respect to this item "was a guess based on conditions contrary to fact," and was "too speculative to be admissible." (App. A, *infra*, p. 68.) It stated that petitioners' expert witness, Hodge, was permitted

to testify that if 12,000 (additional) tons of fruit had been made available to petitioners on the same terms as fruit had been made available to Treesweet, then, based upon the 1949 and 1950 operations of petitioners, they would have had an (operating) profit in the year ending January 31, 1952; that the hypothetical question put to Hodge excluded any reference to conditions in the industry generally in any year, or even to the operations of petitioners in 1951; that Hodge used petitioners' 1949 processing and general administrative costs, and then deducted, not the selling costs per ton but petitioners' actual selling cost in the fiscal year ending January 31, 1952. The court then concluded that it could not find in the hypothetical statement of facts upon which the expert's opinion was based "that fair statement of all the facts which is required as a basis of any hypothetical question." (App. A, *infra*, p. 68.)[31]

This statement by the court below on the issue of the loss of profits item ignores the purpose of this part of the Hodge testimony, his explanation of the basis upon which his opinion was rested as well as other evidence which the jury considered with reference to this item of damage which was completely independent of the Hodge testimony. The Hodge opinion was not offered as a basis for the claimed loss of plant item as is stated by the court below. (App. *infra*, p. 66.) It was offered to show what the probable amount of

[31]While insisting that it reached its conclusion "Without going into the credibility of such testimony," the court below nevertheless felt constrained to say, *inter alia*, that the witness Hodge "was not familiar with the accounting of any juice processor other than Winckler & Smith." (App. A, *infra*, p. 67.)

petitioners operating profit would have been in 1951, absent respondents' violation of law.

The substance of the testimony referred to by the court below, dealt primarily with Exs. 65 and 69A and the Hodge opinion based thereon, that petitioners would have recovered their operating loss of $184,523.20 and would have had an overall operating profit of $25,231.45 for the processing year ending Jan. 31, 1952, if petitioners had received treatment comparable to Treesweet during the 1951 processing year. [R. 1721, 1889-1905-1908, 1941-1943.] Since the petitioners did not have the additional 12,000 tons in 1951, the Hodge testimony necessarily had to deal with some assumptions which could not be established by direct evidence since the acts of respondents had made it impossible to produce such evidence. His estimate of the amount of lost profits admittedly dealt with what was never actually earned because of respondents wrongdoing. Respondents were given every opportunity, as were the defendants in *Rankin Co. v. Associated Bill Posters of United States et al.*, 42 F. 2d 152, 155 (C. A. 2), cert. den. 282 U. S. 864, by cross-examination or the offer of their own evidence to discredit such testimony and to show any fallacy in its reasoning. [Ex. CB, R. 2469-2488.] The Court of Appeals affirmed jury verdicts in *Rankin* which were based on loss of profit damage items on substantially less evidence than is present in the instant case.

While the court below complains about the use of 1949 processing costs by Hodge it ignores his explanation for such use. He testified for example that he used 1949 operating costs because 1949 was a normal

or true processing season for petitioners on a comparable quantity basis;[32] that 1950 included other products and hence was not a normal Valencia season. [R. 17. . 1871, 1870.] And in 1951 petitioners had no oranges for processing into single strength juice. [R. 1004-1005, 1052-1053.] Respondents and Treesweet's processing costs were also comparable on a case as well as a tonnage basis. Petitioners operating head testified that its processing costs for single strength juice would have been $1.35 a case on normal operations in 1951, [R. 1035] Respondents actually paid Treesweet $1.37531 a case as processing costs in 1951 under the Treesweet contract. [Ex. 30, Schedule No. 1.] The processing costs of petitioners and Treesweet were also comparable on a tonnage basis. Petitioners costs were $34.06 a ton in 1949 as against $35.57 a ton paid Treesweet under its 1951 contract. [Ex. 20, R. 1876-1877, 1893.]

The other evidence which the court below ignored and which was before the jury on the loss of profit item consisted of the opinion testimony of petitioners operating head that, assuming normal operations in 1951, petitioners would have earned a profit if they had had access to oranges for processing into single strength juice on a basis comparable to the arrangement under which respondents made oranges available to Treesweet for such purposes. Petitioners profit record before income taxes of $121,360.00 and $40,845.33 for the

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[32]In 1949 petitioners processed approximately 12,700 tons of Valencia oranges, more than 75 per cent of which were processed into single strength juice. [R. 1004, 1027, 1029.] During that year petitioners processed 18,324 tons of raw fruit. [Ex. BP.]

processing years 1949 and 1950 support that opinion and probability. [Exs. 39, 61, 63.]

While all of this evidence was before the jury, and was doubtless considered by them in reaching their verdict on the loss of profit item of damage, the court below not only ignored it, but substituted its judgment for that of the jury. Certainly it cannot be said that such evidence was not substantial. Nor can it be said that fair-minded men could not have drawn different inferences or different conclusions from a consideration of all of the evidence offered on such issue, even if such evidence had involved some speculation and conjecture.[33]

The decision of the court below on the loss of profits item of damage is in direct conflict with *Bigelow v. R.K.O. Radio Pictures*, 327 U. S. 251, 264, wherein this Court held that the quantum of proof required to sustain the amount of damage in a private antitrust suit is measurably less than that required to prove the fact of damage or injury; that "* * * the jury may make a just and reasonable estimate of the damage based upon relevant data * * *"; that "In such circumstances 'juries are allowed to act upon probable and inferential, as well as direct and positive proof'", and that "Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim." The record evidence relating to the loss of

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[33]See *Lavender v. Kurn*, 327 U. S. 645, 653, where it was said that "Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation is required on the part of those whose duty it is to settle a dispute by choosing what seems to them to be the most reasonable inference. Only where there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

profit item in the instant case was amply sufficient to meet the quantum of proof required by *Bigelow*, and was sufficient to support a just and reasonable inference that petitioners were damaged in such amount by conduct which the court below held was a violation of the Sherman Act and also held that petitioners had been injured thereby.

Another instant in which the court below substituted its judgment for that of the jury where there was substantial evidence in the record to support the jury finding, related to the element of causation on the loss of plant item of damage. The amount of the plant loss item of damage was not questioned by the court below. The court did, however, question such item on the issue of causation by treating petitioners' theory of liability as one involving a refusal by respondents to sell petitioners 1.54 percent of their orange requirements and the refusal of other producers to sell petitioners a larger percentage. (App. A, *infra*, pp. 65-66.)[34]

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[34]The court below went even further and said that "At the time the plaintiffs below requested oranges from Sunkist the encumbrance on the Winckler & Smith property was in default and a sale on account thereof, already set." (App. A, *infra*, p. 66.) There was no record evidence to support such statement. In its order denying the respective petitions for rehearing in which petitioners had pointed out evidence to the contrary the court deleted from such statement the words "and a sale on account thereof already set." (App. C, *infra*, p. 72.) The undisputed evidence showed that the loan was not declared in default until July 26, 1951, or during the middle of the processing season. [R. 1835.] The notice of default was not filed until August 15, 1951, and the date of the trustee's sale was set for December 15, 1951, long after the processing season was over. [R. 2002.] Petitioners' first request for oranges on a non-discriminatory basis was made about June 15, 1951. [R. 1958.] As early as July 7, 1951, petitioners had requested fruit on the same basis as respondents were making fruit available to petitioners' competitor Treesweet. [R. 1963.]

Neither the pleadings nor petitioners' evidence support such a theory. The complaint charged [R. 265-272], and the evidence showed (See Statement, *supra*, pp. 5-15), that this case involved an abuse of monopoly power by respondents in discriminating against petitioners and in favor of petitioners' competitors Treesweet and Silzle, in the sale of product oranges made available by respondents to independent processors in 1959, including petitioners, for processing into canned single strength orange juice and the sale thereof in interstate commerce.

The evidence before the jury showed that in 1951, petitioners had the only substantial available supply of such oranges; that they set a price of $40 per ton on such oranges, and offered them to the trade at such price, including petitioners; that the $40 price was maintained throughout the processing season; that respondents admitted that no processor could pay such a price and process and sell the resultant juice at a profit; that respondents made such oranges available to petitioners' competitors who have not been regular customers of respondents in the purchase of oranges under arrangements which in effect provided such competitors with oranges at approximately half the $40 price; that petitioners who had been a regular customer of respondents in the purchase of oranges sought comparable treatment which was refused; that as a result of the maintenance of the $40 price and such refusal, petitioners were unable to process and sell any of their principal product in 1951, and thereby sustained a substantial operating loss; that such operating loss set in motion a series of events which resulted in the loss of petitioners' plant and business. (See Statement, *supra*,

pp. 5-15.) Respondents never refused to sell oranges to petitioners at the $40 price. There was a refusal to deal only in the sense that respondents refused to sell oranges to petitioners except at a discriminatory price or to make oranges available to petitioners for processing into juice for sale, on the same basis as respondents made them available to petitioners' competitors. [R. 1058-1085.]

Respondents insisted that petitioners' losses were caused by other conditions, such as failure of a previous source of partial supply; inadequate financing; inefficient management, and quality of product. [R. 3588-3589, 3660.] The trial court's instructions on proximate cause [R. 3686], and on intervening cause [R. 3721] were not objected to by respondents. This conflicting evidence presented a purely factual matter for resolution by the jury. On substantial record evidence the jury adopted petitioners' theory of causation on the plant damage item of loss.[35]

In substituting its judgment for that of the jury on causation relating to the item of plant damage, the decision of the court below is in direct conflict with this Court's decision in *Story Parchment Co. v. Patterson Parchment Co.*, 282 U. S. 555. Therein, under conflicting evidence, the court of appeals had substituted its judgment for that of the jury on an issue of causation. In reversing this Court said (p. 560):

> "Whether the unlawful acts of respondents or conditions apart from them constituted the proxi-

[35] In *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35, this Court said "The very essence of [the jury's] function is to select from among conflicting inferences and conclusions that which it considered reasonable."

> mate cause of the depreciation in value, was a question upon the evidence in this record, for the jury to be determined as a fact, in view of the circumstances of fact attending it.' *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469, 474. And the finding of the jury upon that question must be allowed to stand unless all reasonable men exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

Another ruling illustrates the confusion of the court below. On the issue of liability the respondents had offered evidence (by way of a defense to the suit) to show that petitioners had watered their product, and that such fact was a part of respondents' "state of mind" when they refused petitioners' request for oranges on the same basis as respondents had made oranges available to petitioners' competitors. [R. 2535, 2541, 2502-2504, 2573-2576, 3019.] The trial court had excluded such evidence on the ground, *inter alia*, that it was in the nature of after acquired knowledge, was pure hearsay, and injected foreign issues into the case. [R. 3024-3029.] The court below held that it was not reversible error to exclude such evidence on the issue of liability. (App. A, *infra*, p. 50.)

But, Respondents had also insisted that such evidence was relevant on the issue of damages. [R. 2535, 2541.] The trial court ruled that such evidence was not admissible on such issue unless respondents first offered evidence "that the loss of sales was due to this adulteration of product, which you so far haven't done, and which I doubt you can sustain." [R. 2541.] Thereafter, respondents offered no evidence whatever of loss sales by petitioners in any year which might be at

tributed to any alleged adulteration of product, or for any other quality reason, although the trial court had invited them to produce such evidence. Nevertheless, the court below held that the exclusion of such evidence, evidence which the trial court had invited but which respondents had never offered, "clearly was prejudicial on the issue of damages," and that such was true "particularly in view of the specific terms of the offer with respect to causation, and specifically, dissatisfied users with resultant loss of sales." (App. A, *infra*, p. 59.) Hence the court below found that it was clearly reversible error to "exclude" evidence which was never offered.

II.

The second question presented is whether an appellate court may "presume" that evidence excluded by the trial court was prejudicial merely because such court "believed" without stating any reasons therefor for the guidance of the trial court on retrial, that such exclusion denied the defendants an opportunity to present their defense on the issue of damages.

In the court below respondents herein had claimed error in what they deemed to be restrictive rulings by the trial court with respect to five items. Two of these items related to an alleged "milking" of corporate assets by petitioners. A third item related to the trial court's exclusion of petitioners' income tax returns for the years 1949 and 1950, years in which petitioners had introduced evidence showing profitable operations. The fourth item involved the exclusion of an exhibit offered by respondents to show that petitioners' expert witness, in preparing his exhibit showing what petitioners would have earned in 1951, if 12,000 tons

of oranges had been made available to petitioners on the same basis as respondents had made oranges available to Treesweet, had failed to account for the oil and peel which, under a Treesweet type contract, would have been returned to respondents, and that had petitioners' expert so accounted for the peel and oil, his calculations based upon the 12,000 tons would have shown a loss. The fifth item related to the trial court's exclusion of certain letters which respondents had written to their customers explaining why petitioners were unable to supply such customers with single strength orange juice in 1951.

Without giving any reason whatever as to why any of these specific items should have been received in evidence the court below held that their exclusion was reversible error. It disposed of them summarily and *en masse* by saying (Apps. A, *infra*, p. 63):

> "Without going into precise details as to which portions of this evidence to which objections were sustained should have been admitted, we can say that we believe appellants were denied a fair opportunity to present their defense on the issue of damages to the jury. For example, income tax returns are frequently admissible, even though capable of being explained away. *Roche v. Commissioner*, 5 Cir. 1933, 63 F. 2d 623; *United States v. Farrell*, D. Conn. 1929, 35 F. 2d 38, and the business experience and operations and profits of previous years are not always, or necessarily, inadmissible."

The court below then said "It cannot be said that the erroneous exclusion of evidence directly bearing on damages would not have affected the verdict. *The error is*

therefore presumed to be prejudicial." (App. A, *infra*, p. 63.) (Emphasis supplied.)

In view of the court's failure to point out which of the excluded items should have been admitted, or why, neither the trial court not the litigants on the retrial of the single issue of the amount of damage will know whether any one or more of these items may be properly excluded, or whether all must necessarily be admitted. Neither the trial court nor the litigants have been provided with any directions or standards with respect to the admission or exclusion of any of such items. On retrial both the trial court and the litigants will be forced to surmise and speculate with respect to the admissibility or exclusion of each of such items. In the absence of any standards an eventual second appeal is invited. Such a result neither serves the ends of justice, nor of the expeditious disposition of litigation. On the contrary, it unnecessarily burdens both the trial court, the court of appeals, and the litigants with a multiplicty of suits involving the same factual situation.

It is suggested that this is a case which warrants the exercise of this Court's supervisory powers under its Rule 19(b) which provides, *inter alia*, for a review by way of the writ where a court of appeals "has so far departed from the accepted and usual course of judicial proceedings * * * as to call for an exercise of this court's power of supervision." This Court has held that an appellate court on remand of a case must

make its rulings with proper clarity and definiteness so as to permit the trial court to understand what it is to do and how it is to proceed. *Duke Power Co. v. Greenwood Co.*, 299 U. S. 259, 268.[36]

While the judgment below was not final in view of the limited remand, it is an appropriate judgment for review by this Court at this stage since it involves an issue that is fundamental to the further conduct of the case, namely, the necessity for a precise statement as to why certain classes of evidence will or will not be admissible on such retrial. In similar circumstances this Court has reviewed orders which were interlocutory in character. *United States v. General Motors Corp.*, 323 U. S. 373, 377; *Land v. Dollar*, 330 U. S. 731, 734 n. 2; *Larson v. Domestic & Foreign Corp.*, 337 U. S. 682, 685, n. 3; *Youngstown Co. v. Sawyer*, 343 U. S. 579, 584-585. Certainly a grant of the writ under the circumstances herein is necessary to prevent extraordinary inconvenience and further confusion in the conduct of this case.

A brief reference to the content of some of the excluded items and the reasons for their offer and rejection in the trial court will point up the dilemma with which both the trial court and the litigants will be faced upon retrial of the issue of damages only. The

[36] Likewise in the field of criminal law this Court has exercised its supervisory powers in order to assure the maintenance of proper standards of procedure and evidence in the lower federal courts. See *McNabb v. United States*, 318 U. S. 332; *Rosenberg v. United States*, 346 U. S. 273; *Offutt v. United States*, 348 U. S. 11.

excluded income tax returns are illustrative. Petitioners had introduced exhibits[37] to show that they had earned a profit in 1949 and 1950, the two years immediately preceding the damage year 1951. Respondents offered petitioners' federal and state income tax returns for 1949, 1950 and 1951.[38] The purpose of the offer was not stated. [R. 3076.] Presumably the purpose was to show that petitioners did not earn a profit in any of those years. These returns reflected the application of a previous tax loss carry-over for the year 1947, against operating profits for the years 1949 and 1950. The trial court excluded the returns on the ground that their admission would require the court to inform the jury about the tax statutes which would raise a whole series of issues that would have little if any effect upon the ultimate issues of the case. [R. 3076-3077.] The court below held such exclusion was error but didn't say why it was error.[39] On retrial must the trial court admit, or may it reject such exhibits upon proper grounds? And if it admits them must it do so on the erroneous ground that profit and loss under a tax structure is indistinguishable from profit and loss from a damage standpoint? Surely the evidence proffered must have some relevancy to the issue upon which it is offered.[40] It was the absence of such relevancy that moved the trial court to exclude these exhibits.

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[37]Exhibits 61 and 63.

[38]Exhibit E.

[39]In *Standard Oil Co. of Cal. v. Moore*, 251 F. 2d 188, 222 (1958), the Court of Appeals for the Ninth Circuit, in a case involving a suit for treble damages under the Sherman Act, had held that income tax returns were not admissible as primary proof of the income of a business for damage purposes.

[40]See *Thompson v. Boggie*, 71 U. S. 403, 471.

A similar situation will obtain with reference to respondents' proffered Exhibit BS. Petitioners had introduced Exhibit 69A to show the operating profit they would have made in 1951 if they had had an additional 12,000 tons of oranges available to them for processing into single strength orange juice under a contract similar to the contract which respondents had made with petitioners' competitor Treesweet in 1951. Respondents were permitted to show by testimony and exhibit that petitioners would have sustained an operating loss of $212,829.03 if they had had the additional 12,000 tons for processing purposes. [Ex. CB. R. 2488.] Yet respondents offered their Exhibit BS to show that if petitioners had been given such a contract they would have lost a much greater amount. [R. 2493-2494.] The trial court rejected this exhibit on the ground that it did not reflect the same cost basis as petitioners' Exhibit 69A, which latter exhibit was prepared on the same cost basis as was the contract between respondents and Treesweet. [R. 2493-2499.] On remand is respondents' Exhibit BS to be received or rejected if re-offered? The court below offered no guide.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted.

WILLIAM C. DIXON,
HOLMES BALDRIDGE,
Attorneys for Petitioners.

Of Counsel:
HARRY M. IRWIN,
Attorney for Trustee Petitioner.

August, 1961.

APPENDIX A.

Opinion of the Court of Appeals.

[Title of Court of Appeals and Cause.]

Before: Stephens, Barnes and Merrill, Circuit Judges.

Barnes, Circuit Judge:-

This is a private action for treble damages under the Sherman Act, 15 U.S.C. §§ 1-7, 15. Appellants are Sunkist Growers, Inc., a corporation (hereinafter referred to as Sunkist) and The Exchange Orange Products Company, a corporation (hereinafter referred to as Exchange Orange or EOP). Appellees are Winckler & Smith Citrus Products Co., a corporation and Ronald Walker, as trustee of Winckler & Smith (hereinafter referred to as Winckler or Trustee). The action was tried in the district court before a jury, which returned a verdict of $500,000. This was trebled to $1,500,000, and from that there was deducted the $2,500 originally paid in compromise by one-time defendant TreeSweet. There were added attorneys' fees fixed at $195,000, and costs. Timely appeal was filed in this Court. After argument, but before decision, one of the judges hearing this appeal died. It was thereupon set down for hearing a second time, was heard, and held pending the determination by the Supreme Court of *Milk Producers Assn. v. U. S.*, 1960, 362 U. S. 458, having to do with the antitrust exemptions of agricultural marketing cooperatives.

I.

PARTIES.

Sunkist Growers, Inc., a corporation, was sued in the district court originally under its former name, California Fruit Growers Exchange. It is and has been a nonprofit agricultural cooperative marketing associa-

tion. The second defendant, The Exchange Orange Products Company, a corporation, was sued in the court below as The Exchange Orange Products Company. At all times it was a wholly owned subsidiary of Sunkist. Together with Sunkist and Exchange Orange, there was originally named as a defendant Exchange Lemon Products Company, a corporation, sued originally as Exchange Lemon Products Company, a nonprofit corporation (hereinafter sometimes referred to as ELP or Exchange Lemon).

On motion of plaintiff, Exchange Lemon was dismissed with prejudice as a defendant, and was subsequently named as a coconspirator in plaintiff's second amended complaint filed February 2, 1950, to conform to proof.

TreeSweet Products Company, a corporation (hereinafter referred to as TreeSweet) was an original defendant, but settled for $2,500, and was dismissed as a defendant. In the said second amended complaint, it was referred to as a coconspirator.

E. A. Silzle Corporation, a corporation (hereinafter referred to as Silzle) was never a defendant but was named a coconspirator in both plaintiffs' first and second amended complaints.

Appellee Ronald Walker is trustee of the estate of Winckler & Smith Products Co. in those proceedings pending in the district court below for its reorganization under Chapter X of the Bankruptcy Laws, being Number 53880-C of the records of said court. Mr. Walker was appointed March 20th, 1952 as such trustee, and by order made May 9, 1952 he was permitted to and did intervene in this case. Mr. Walker

is sometimes referred to herein as appellee, Walker, Trustee, or as Intervenor.

Thus on this appeal there are two appellants, Sunkist and EOP, and two appellees, the Winckler corporation and the Trustee.

II.

THE THEORY OF THE CASE

Appellees allege in their first cause of action (Section 1 of the Sherman Act; 15 U.S.C. §1), and appellants deny, that appellants have conspired and entered into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned California citrus fruit juice, particularly single strength orange juice. This was proved, say appellees, by "six acts." These were:

(a) In the 1950-1951 canning season ELP processed 28,812 tons of oranges for EOP at cost and without profit to ELP. Appellants *admit* this.

(b) During the same period, EOP processed 1,740 tons of lemons for ELP on the same basis. Appellants *admit* this.

(c) Sunkist and EOP agreed to establish and maintain the price of by-product oranges available to independent processors like appellees at a level making it impossible for processors like appellees to purchase oranges from EOP, or any other source, at a price or under any other arrangement enabling appellees and other processors to produce and sell canned natural orange juice and frozen concentrate juice at prices competitive with prices charged by appellants and their favored customers, TreeSweet and Silzle. Appellants *deny* these allegations.

(d) Under a contract effective July 23, 1951, between EOP and TreeSweet, TreeSweet received oranges from EOP, made single strength orange juice for EOP at cost and without profit to TreeSweet, and then bought the orange juice from EOP at Sunkist's then published price for single strength orange juice, less certain discounts not available to other customers, including appellees. The purpose and effect of this contract allegedly was to enable TreeSweet to obtain orange juice at a cost which prevented appellees from competing with Sunkist or TreeSweet in the natural orange juice market. Appellants *admit* the contract and supplying the oranges; *deny* the balance.

(e) Under a contract effective June 29, 1951, between EOP and Silzle, EOP furnished oranges to Silzle at $22.50 per ton, which was lower than the price to appellees or other processors. The purpose and effect allegedly was to give Silzle oranges at a price with which appellees could not compete. Appellants *admit* the contract and furnishing the oranges; *deny* the purpose or effect.

(f) EOP refused appellees a TreeSweet or Silzle type contract in 1951. Appellants *denied* the refusal, but *admitted* such a contract was not made.

Appellees allege that as a result of the above acts of appellants (listed in (a) to (f) above), and the monopoly control of Sunkist and Exchange Orange in 1951 over the amount and price of Valencia oranges available for processing, appellees were unable to process natural and frozen concentrate fruit juice in competition with Silzle, TreeSweet and Sunkist, which alleged facts eliminated appellees as a competitor, and forced the filing of proceedings under Chapter X of

the Bankruptcy Act. These allegations were added in the second amended complaint filed after the close of evidence. They were materially different from those in the original complaint. Appellants *deny* all these allegations.

Under the second cause of action (brought under §2 of the Sherman Act; 15 U.S.C. § 2) it was charged that acts (a) to (f) above were done by appellants with monopoly control over citrus fruit markets in California and Arizona, and in so doing and in making such contracts, the parties named conspired to monopolize, and monopolized, single strength Valencia orange juice.

The second amended complaint additionally alleged contracts with independent processors Hyland-Stanford and Mission Dry, giving them first call on oranges and processing to the exclusion of Independent Fruit Growers' Association and Morgan Ward, its selling agent, and one of the appellees' principal suppliers of by-product oranges.

Appellants plead five separate defenses:

First: The second amended complaint, the amended complaint, and the original complaint each failed to state a claim upon which relief could be granted.

Second: The applicable statute of limitations, Section 338(1) of the Code of Civil Procedure of California, bars all causes of action asserted in the second amended complaint and in the amended complaint.

Third: All causes of action alleged in the second amended complaint and the amended complaint are barred by the laches of appellees, in that appellees are barred by laches and estopped from relying upon any

acts involving Silzle, as the Silzle contract was disclosed to appellees on March 14, 1952, and appellees did not amend their complaint to include this contract until December 15, 1954, and such a long delay was prejudicial to appellants.

Fourth: Appellees are barred by laches and estopped from relying on the Hyland-Stanford and Mission Dry contracts first referred to in the second amended complaint, as these contracts were disclosed to appellees on November 9, 1955, and appellees did not amend their complaint to refer to the Hyland-Stanford contract until January 31, 1956 (during the last few days of the trial) or to the Mission Dry contract until February 4, 1956 (after all the evidence was in), and such long delay was prejudicial to appellants.

Fifth: Appellees are barred by laches and estopped from alleging the new matters in the last paragraph of III(f) of the first cause of action (referred to in (f) above), because appellees knew of such matters through discovery long before trial and did not seek to amend its complaint to refer thereto until January 31, 1956, to appellants' surprise and prejudice, and such long delay was prejucial to appellants.

This is a long record before us, and the matter is as complicated, both factually and legally, as is most antitrust litigation. We attempt to summarize the appellees' position by first stating what it was not. It was *not* appellees' position that appellants did not have certain exemptions from the antitrust laws under the

Clayton and Capper-Volstead Acts, nor that they could not, as agriculturists, join together to make marketing agreements. It was appellees' position that such exemptions so granted were not absolute. Appellants could monopolize by-product oranges or single strength orange juice, either in the national market or in the California-Arizona area market, provided they achieved their monopoly position lawfully. Appellants could set any price they desired for their juice. They could make any "true" processing contracts with TreeSweet and Silzle, or with anyone else. They could refuse to make oranges available to appellees, if activated by "proper" business motives, as distinguished from "improper" motives.

Appellees insist, however, that appellants having monopolized by-product oranges from which single strength juice was made, and by such monopolization having control over the amount of by-product oranges available to independent contractors; having further set a price of $40.00 per ton for such oranges (a price alleged to have been one at which no independent processor could buy, process and compete with Sunkist in the single strength juice market); having at the same time (*i.e.*, during the one year of 1951, here involved) made oranges available to TreeSweet and Silzle, competitors of appellees, under so-called "processing" contracts which were more than that because they permitted the competitors to secure oranges at a price substantially lower than $40.00 per ton; the appellants were thus guilty of a conspiracy or combination unauthorized by antitrust

law, even as modified by the limited agricultural marketing exemptions.

Under this theory of the case, the court sought to leave with the jury several *questions of fact*, namely:

(1) Whether appellants had a legal monopoly of by-product oranges (and a resulting legal monopoly in single strength orange juice) in the California-Arizona market.

(2) Whether, if appellants did have such legal monopoly, it was used legally or illegally, in the particulars alleged.

(3) Whether such monopoly, if proved, gave appellants power and control over single strength orange fruit juice prices in the California-Arizona market.

(4) Whether such power and control, if proved, was used with the purpose or with the effect of eliminating a competitor in such market, *i.e.*, eliminating appellees.

(5) Whether such power and control, if proved, was sufficient to enable appellants to determine the price or the terms and conditions under which by-product oranges were available in 1951 to independent processors, including appellees.

(6) Whether appellants had conspired with non-defendant coconspirators to unlawfully use their market power and control to appellees' alleged consequent injury, or whether appellants had unlawfully used such monopoly power and control to appellees' injury.

(7) What damages were proximately caused by appellants' alleged actions.

With this explanation of our understanding of the theory of the case, we pass to:

III.

QUESTIONS RAISED ON THIS APPEAL

There are four principal questions raised on this appeal: Was *any* violation of antitrust laws made out? Was there error in instructing or refusing to instruct the jury? Was there error in rulings on admission and rejection of evidence? Was there error in affixing attorneys' fees of $195,000? We shall discuss each in turn.

A. *Was any violation of antitrust laws made out?*

1. *The Exemption of Agricultural Cooperatives Generally*

There can be no conclusion as to the first error alleged until we determine the nature and extent of the exemption granted by law to agricultural cooperatives. This was raised by the pleadings and particularly, appellants' first and separate defense.

Sunkist was a nonprofit agricultural cooperative marketing association. So was EOP, a subsidiary of Sunkist. So was ELP, an association of growers who were likewise members of Sunkist.

The exemption claimed by appellants rests within §6 of the Clayton Act and §1 of the Capper-Volstead Act. Section 6 of the Clayton Act (38 Stat. 731 (1914), 15 U.S.C. §17 (1958)) reads as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital

stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects hereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 1 of the Capper-Volstead Act (42 Stat. 388 (1922), 7 U.S.C. §291 (1958)) reads in material part as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in association, corporate or otherwise . . . in collectively processing, preparing for market, handling and marketing in interstate . . . commerce such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes. . . ."

The legislative history of the Clayton and Capper-Volstead Acts makes it clear that farmers (including orange growers) were granted the right to combine, contract and conspire together in restraint of trade in associations which, without the exemptions, would have violated the Sherman Act. Its purpose was to permit the farmers to compete with large corporations.[1]

[1] "In the early 1900's, when agricultural cooperatives were growing in effectiveness, there was widespread concern because the mere organization of farmers for mutual help was often considered to be a violation of the antitrust laws. Some state courts had sustained antitrust charges against agricultural cooperatives, and as a result eventually all the States passed Acts

But by its terms, the exemption was not absolute—the individuals were permitted to associate in groups and the associations were permitted specifically to do but two things: "arrange marketing agencies in common," and contract and agree with their members participating, if necessary, to effect such purposes. As the most recent Supreme Court decision states:

> "Thus, the full effect of §6 is that a group of farmers acting together as a single entity in an association cannot be restrained 'from lawfully carrying out the *legitimate objects* thereof' (emphasis supplied); but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." *Milk Producers Assn. v. U.S., supra,* at 465-6.

There have been few cases dealing with the Capper-Volstead Act exemptions.[2] At the time this case was tried in the district court, *United States v. Borden Co.*, 1939, 308 U. S. 188, was the leading case. It held that Capper-Volstead does not wholly exempt cooperatives, and particularly those conspiring with non-exempt legal entities. This same principle has been

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authorizing their existence. It was to bar such prosecutions by the Federal Government as to interstate transactions that Congress in 1914 inserted § 6 in the Clayton Act exempting agricultural organizations, along with labor unions, from the antitrust laws." Milk Producers Assn. v. U.S., *supra* at 464.

[2]Milk Producers Assn. v. U.S., *supra;* Tigner v. Texas, 1940, 310 U. S. 141; United States v. Borden Co., 1939, 308 U. S. 188; United States v. Maryland & Virginia Milk Pro. Assn., D. C. Cir. 1949, 179 F. 2d 426; Hinton v. Columbia River Packers Ass'n., 9 Cir. 1942, 131 F. 2d 88; United States v. Maryland Cooperative Milk Pro., D. C. 1950, 145 F. Supp. 151; Cape Cod Food Products v. National Cranberry Ass'n., D. Mass. 1951, 119 F. Supp. 900; Manaka v. Monterey Sardine Industries, S. D. Calif. 1941, 41 F. Supp. 531.

applied to labor unions, which have no absolute exemption from antitrust laws. *Allen Bradley Co. v. Union*, 1945, 325 U.S. 797, 805. The Clayton Act, §6, applied only to nonstock agricultural cooperatives. Section 1 of the Capper-Volstead Act extended the same exemption to capital stock agricultural cooperatives.

> "[T]he general philosophy of both [acts] was simply that individual farmers should be given, through agricultural cooperatives acting as entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities." *Milk Producers Assn. v. U.S., supra*, at 466.

And in conclusion, Mr. Justice Black stated:

> "[T]he [Capper-Volstead] Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." *Id.* at 467.

We conclude, therefore, that no blanket exemption is created by either Section 6 of the Clayton Act or Section 1 of the Capper-Volstead Act which permits an agricultural cooperative to either unlawfully monopolize, or attempt to monopolize, under Section 2 of the Sherman Act, nor to do any acts to restrain or suppress competition, or which result in the restraint or suppression of competition prohibited by Section 1 of the Sherman Act, if such acts, in either event, fall within the prohibitions of the respective Sherman Act sections. Thus the question as to whether there has been a violation of the antitrust laws is ordinarily one to properly go to the jury.

We next consider if there was proof of the violation of antitrust laws, despite the limited exemption the appellant Sunkist enjoys, sufficient to make out a question of fact for the jury. To pass upon this, we must consider certain of the facts of this case in detail in an attempt to establish and define the product and the pertinent market with which we are here concerned.

2. The Product Involved

As the case went to the jury, the defendants Sunkist and EOP were charged, as appellees' counsel put it on oral argument, with "a combination and conspiracy" [under Sections 1 and 2 of the Sherman Act] to restrain trade in California citrus juices and to monopolize the production, processing and sale of those juices, primarily, insofar as appellee is concerned, single strength juices." The contracts charged to be in restraint of trade were allegedly made with the purpose of eliminating a competitor, the appellees.

In the first cause of action contained in appellees' amended complaint, the relevant market was designated as "canned citrus fruit juice, produced and processed in the State of California, and marketed throughout the United States." Thus originally all citrus fruit juice was involved; orange, lemon and grapefruit. By the amendment to the complaint to conform to evidence, the relevant market was restricted to "single strength Valencia [orange] juice."

In that respect it was alleged (again to conform to proof) that:

> "A total of approximately 5,400,000 gallons of single strength Valencia juice was processed in

California in 1951. Of this amount, defendants EOP, TreeSweet and Silzle processed approximately 4,511,202 gallons, of which amount approximately 3,044,394 gallons were processed by TreeSweet and Silzle under the contracts and arrangement [complained of]. . . . Because of the monopoly control by Sunkist and EOP over the quantity and price at which Valencia product oranges were made available to independent processors of single strength juice other than TreeSweet and Silzle, and the aforesaid contracts, plaintiff was unable to and did not process any single strength Valencia juice in 1951."

3. *The Relevant Market*

The record discloses that entirely apart from the marketing of citrus fruit itself as the end product, an important consideration in the citrus industry is the utilization of by-products, such as oils from the peel, peel and pulp for cattle feed, and the juices themselves. Juices are divided in the trade into three categories: (1) The so-called "hot concentrate juice" (the syrup base for mixed citrus drinks); (2) the cold, or so-called "frozen concentrate," which is used to prepare the canned or frozen juice; and (3) the so-called "single strength," being the natural and untreated juice of the orange. Oranges for fruit juice purposes are valued and sold by the extent of their sugar content. Valencia oranges are apparently particularly valued for their high sugar content, and perhaps for their time of arrival on the market (although this advantage, of course, partially disappears when juices are kept from one season to the next).

Oranges are grown primarily in three states—California, Arizona and Florida. Oranges from both East and West Coasts compete in the national markets, both in fresh oranges and by-products. Due to the freight rates, California and Arizona oranges and juices are sold on a two-price structure—cheaper in the East, where Florida is closer and the freight costs on Florida juice lower, and more expensive in the West, where transportation from Florida costs more. We conclude the relevant market area here involved was the California-Arizona area.

4. *Competition and Prices in the Product Involved in the Relevant Market*

During the year 1951, Sunkist controlled approximately seventy per cent of the total by-product Valencia orange market in the California-Arizona area, or 318,000 tons of by-product oranges.

The remaining thirty per cent of by product Valencia oranges grown in California-Arizona came from scattered growers such as: (a) Independent Citrus Growers & Shippers Association, a grower cooperative (Morgan Ward, selling agent); (b) Mutual Orange Distributors of Anaheim, California, a grower cooperative; (c) American Fruit Growers Company, an independent grower, packer and shipper; (d) Paramount Citrus Association, a corporation organized by various growers for profit; (e) an unorganized group of individual growers, members of (a) above, who did not desire to market through Morgan Ward.

In 1951 in the California-Arizona area, there were three principal independent processors of by-product oranges: Winckler & Smith, TreeSweet and Silzle

These had no growers to supply them oranges, so they were required to buy their by-product oranges from the aforementioned five "independent" groups of growers, or from Sunkist or its subsidiary EOP, or (as to a very small amount of fruit) from even "more independent" growers than the five independents above mentioned. Mutual, American and Paramount, mentioned in (b), (c) and (d) above, had their own processing facilities, and by 1951 were processing all their own fruit, so had none to sell to independent processors.

"Independent Citrus Growers & Shippers Association" had no processing facilities of its own and no sales organization. It therefore sold to independent processors. Whether these independent processors would buy by-product oranges to process into single strength juice depended, obviously, on the price they might be forced to pay for the oranges, and the price they might get for the canned or bottled single strength juice. If the processors could see no chance to make a profit then the growers' representatives were forced to make processing contracts with hired processors in order to realize anything on their by-product oranges, and to prevent a loss.

There is no question but that Sunkist was the "leader" on pricing within the industry. In 1951 Sunkist admittedly set a price of $40.00 per ton on oranges containing 120 pounds of "soluble solids." (This is a term descriptive of what is left from an orange when water is extracted. It includes sugars, citric acid, and other solids. The average Valencia orange contains 120 pounds of soluble solids per ton of oranges.)

In 1951, "Independent Citrus Growers & Shippers Association" made a contract with Case-Swayne Co.,

Incorporated, an independent processor with no grower's supply, to process its by-product oranges into canned single strength juice, selling it under the Case-Swayne label, paying a net to Independent after deducting costs and a profit. Independent had twelve to fifteen per cent of the total supply of by-product oranges in the California-Arizona market, or at least 53,000 tons.

On August 6, 1951, Morgan Ward for Independent, signed a processing contract with Winckler by which Ward agreed to deliver sixty tons of by-product oranges per day up to three hundred and sixty tons per week during the two-months' canning season for the production of frozen concentrate, but this did not produce single strength juice for Winckler to sell. On August 17, 1951, he wrote to Morgan Ward (Exhibit AZ) in which he complained that he was not getting oranges for single strength juice. He charged monopoly against Morgan Ward and requested the latter to put the matter up to the By-Products Committee of the Independent Citrus Growers & Shippers Association. This was done; the matter was left entirely to Morgan Ward's discretion. That company still refused to sell oranges to Winckler for single strength processing. Mr. Ward's explanation is of interest. He said:

> "Well, in 1951 I knew that we would be faced with a lot of fruit, there being no home for it outside of Winckler-Smith, Case-Swayne, Paramount and a few other small plants, a few small plants otherwise. I knew that we were going to have, in order to get money for the fruit for the growers, we were going to have to enter into participating contracts in processing this fruit, not with one, but several of these. So I wanted to

be fair to Mr. Winckler, I wanted to be fair to Mr. Swayne and Paramount, for that matter, so I knew that Case-Swayne had no facilities except straight canned juice, so the first contract we entered into was with Case-Swayne for single-strength juice, orange juice.

"Q. That was early in the season?

"A. Early in the year. That was the first reason I gave him that part of it.

"The second reason was that if I gave single strength to Winckler and single strength to Case-Swayne, we would have our oranges out in the market competing in canned juice form, competing against each other.

"Then in order to be fair again with Winckler, I gave him the concentrate deal. Even though he wanted some single strength, I did not give it to him for that reason."

Winckler & Smith had been organized in 1946. The amounts of by-product oranges it had purchased primarily from Sunkist and thereafter from others up to and including 1950 had been as follows:

1946—$1,000,000 worth
1947—Substantially less
1948—$200,000 worth
1949—3,500 tons from Sunkist
10,500 tons from Morgan Ward
4,300 tons from other sources
1950— 1,300 tons from Sunkist
11,500 tons from Morgan Ward
4,100 tons from other sources

During this same time, the tons of by-product oranges it had purchased from other sources, including Morgan Ward, had been increasing. Thus it is not entirely accurate to state, as appellees do, that "appellee [Winckler & Smith] had been a regular customer of Sunkist in the purchase of by-product oranges since its organization in 1940," up to 1951.

In 1951 Sunkist started out the year with plans for pooling and disposing of all its by-product oranges. The plan was to have EOP process the fruit, or to sell to other processors. A schedule of prices was established at which fruit was to be sold at a separate price per ton for each pound of soluble solids per ton, ranging from sixty to one hundred and fifty pounds.

The price set on by-product Valencia oranges for 1951 ranged from $17.00 per ton for fruit having sixty pounds of soluble solids to $51.50 per ton for fruit having one hundred and fifty pounds of soluble solids. Fruit having one hundred and twenty pounds of soluble solids was priced at $40.00 per ton, f.o.b. packing house. This price was set by Sam H. Kelly, general manager of Sunkist's Los Angeles District Office. The "Independent Association" followed the "lead" of Sunkist as to price.

Sunkist sold 46,000 tons of by-product oranges at this price to independent processors in 1951. Apparently these oranges went into hot or frozen concentrate, as there was testimony such a price could be paid for such oranges so used in 1951 and produce a profit.

All other tonnage of Sunkist growers in 1951 was turned over to EOP for disposal. This was the largest by-product Valencia orange crop ever handled by EOP. It received 318,000 tons, processed 164,000 tons, and turned over 31,200 tons to ELP for processing at cost.

Exchange Orange thus had 122,800 additional tons of by-product oranges on hand. It sold 19,747 tons to General Foods; 14,842 tons to Hyland-Stanford; 6,773 tons to Mission Dry; and 3,730 tons to Hart's for processing, or a total of 45,092 tons, under "custom packing" contracts,[3] into hot and frozen orange concentrate, but not for single strength juice. It contracted with TreeSweet to process 24,148 tons into single strength juice, and Silzle to process 6,675 tons into single strength juice. These were the contracts described as two of "six acts" which are the basis of appellees' complaint against Sunkist. Ten thousand six hundred and thirty tons were sold to Mission Dry and 817 tons to Hyland-Stanford under a "deferred payment plan."[4] This left 35,000 tons, approximately, which were unsuitable for processing into juice products.

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[3]Under the true processing or "custom packing" contract, Exchange Orange furnished fruit to the independent processor for processing into specified products. The processed products were sold under the Sunkist label by the Products Department of Sunkist. The processor was paid its costs plus an assured profit on the processing operations. In 1951, Exchange Orange made such contracts for the processing of hot and frozen concentrate with Hyland-Stanford, Mission Dry, General Foods and Hart's.

[4]Under the so-called "fruit purchasing" contract, the independent processor agreed to buy all of its by-product fruit requirements from EOP at the going Sunkist price for such fruit at the time of delivery. The processed product was sold by the independent processor under its own label or under the labels of its buyers. The independent was not required to pay for the fruit until such time as it had sold the processed products. In the event the independent stopped buying fruit for its own account, either because of the price of fruit or because its capacity exceeded its own requirements for fruit, its production facilities were to be made available to EOP upon request. If EOP used such production facilities, the independent was paid its costs of operation plus a guaranteed profit. This provision of the fruit purchasing contract ties in to the true processing or "custom packing" contract which EOP sometimes had with the same independent processor.

The years immediately before 1951 had seen a change in the use of by-product oranges. In 1950 EOP processed eleven per cent of all frozen orange juice in the California-Arizona market. In 1951 it processed fifty-eight per cent. There was an increasing market for frozen orange juice. Nevertheless, it was advisable and necessary to maintain the market in canned single strength juice.

There were four principal independent processors of canned single strength orange juice in the California-Arizona area, namely, TreeSweet, Silzle, Case-Swayne and appellee. TreeSweet sold in the national market under its own label. Silzle sold in the national market to private label buyers. Case-Swayne sold largely in the California market under its own label "Case-Swayne." Appellee sold in the national market under its "Anagold" label. These four canners were in competition with each other, and each of them competed with Sunkist, in the sale of canned single strength orange juice in interstate commerce.

5. *Contracts in the 1951 Season*

Under the 1951 contract between Exchange Orange and TreeSweet, Exchange Orange made by-product

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Finley characterized the so-called "fruit purchasing" contracts with Hyland-Stanford and Mission Dry as providing for a "deferred payment" or a "credit plan," since the independent processor was not required to pay for the fruit it purchased from EOP until the products processed therefrom were sold by the independent, even though the processed products were, at all times, the property of the independent. Finley said that the provision in such contracts which required the purchaser to buy its full requirements of by-product oranges from EOP assured the independent of a dependable source of supply of fruit. He stated further that the deferred payment privilege afforded the independent under such contracts was given in exchange for the privilege given EOP for "first call" on the independent's processing facilities.

oranges available to TreeSweet on a consignment basis in such quantities as Exchange Orange determined. Exchange Orange agreed to pay TreeSweet its processing costs at specified rates, and to pay the trucking costs of the fruit to TreeSweet's plant. TreeSweet agreed to purchase the resultant juice at the Sunkist published selling price as of the date of purchase, less discounts and allowances of fifteen per cent plus an advertising allowance of seven cents per case. TreeSweet was not required to pay for the juice until it was sold. The oil and peel were to be the property of Exchange Orange.

Under this contract TreeSweet processed 24,148 tons of by-product oranges into canned single strength orange juice, and sold it in the same interstate markets under the TreeSweet label in competition with similar juice sold by Sunkist and Silzle.

Finley (general manager of Exchange Orange) admitted that the Exchange Orange-TreeSweet contract guaranteed TreeSweet against any inventory losses and protected it against any reductions in the market price for canned juice during both the selling and carry-over seasons. He admitted further that TreeSweet was guaranteed a profit under such contract. He stated that the TreeSweet contract provided, in effect, that Exchange Orange was to be paid for its by-product oranges on the basis of the difference between the amount credited to TreeSweet for processing such fruit and the price which TreeSweet paid Exchange Orange for the processed juice.

The amount credited to TreeSweet for processing the 24,148 tons was $859,004.00, and the amount payable by TreeSweet for the juice processed therefrom was

$1,204,031.41. The difference between these two figures, to wit: $345,027.41, was the amount TreeSweet actually paid Exchange Orange for the 24,148 tons without the peel and oil by-products, or at the rate of almost $14.29 per ton.

Under this contract, EOP was to get the oil and peel or the proceeds therefrom. The net return from the oil and peel was $10.81 per ton. Therefore, the total amount EOP received for the by-product oranges processed under the TreeSweet contract was $25.10 per ton, namely, $14.29 actually paid by TreeSweet plus $10.81 for the oil and peel, or a price which was $19.12 less than the price for which the same quality of oranges were available for sale by Sunkist to other independent processors, including appellees.

Substantially the entire production of single strength orange juice under this contract was marketed under the TreeSweet label, and none of it was sold under the Sunkist label. TreeSweet received an advertising allowance of seven cents per case. The usual purpose of an advertising allowance was to advertise the brand name of the concern granting such allowance, but in this case TreeSweet was permitted to make any use it saw fit of this advertising allowance.

The contract with TreeSweet was justified on the ground that TreeSweet had the facilities to process the juice and the sales organization to move the merchandise, and on the ground that it was important that some California single strength juice be on the market in 1951. Sunkist had never mentioned to any independent processor until 1951 that this kind of arrangement was being made available to TreeSweet during the years 1947 to 1950, inclusive.

Silzle was engaged primarily in the business of processing and selling canned single strength orange juice. It sold such juice primarily to private label buyers who sold to the same class of customers and in direct competition with canned single strength juice sold by Sunkist, TreeSweet and appellees. Silzle had secured through the Bauer Fruit Company, a partnership composed of certain stockholders of Silzle, its fruit requirements.

Early in 1951, Kelly of Sunkist called Finley of EOP to secure the latter's approval to sell seventy-two tons of by-product oranges to Silzle at $27.00 per ton, including the oil and peel, in order to permit Silzle to meet a competitive situation then existing with Case-Swayne. Finley approved the sale. These oranges ranged from one hundred twenty-three to one hundred thirty-six pounds of soluble solids per ton which, under the Sunkist published selling price, were priced from $41.15 to $46.13 per ton. A little later, under an oral arrangement, Finley let Silzle have five hundred and twenty-seven tons at $22.50 per ton, with Silzle keeping the oil and peel.

About the middle of June 1951, Finley contacted Thelma Silzle, president of Silzle, and offered her a contract similar to the TreeSweet contract, "and she was willing and wanted a contract." The parties operated on an oral basis for most of the season. The written contract was not signed until September 10, 1951, but by its terms it was to be effective from July 15, 1951 until the end of the season.

Under this contract Silzle processed 6,675 tons of by-product oranges into canned single strength orange juice, in addition to the seventy-two tons and five hun-

dred and twenty-seven tons, purchased earlier. Silzle purchased the canned juice from EOP at the published Sunkist selling price at the time of purchase, less a discount of twelve and one-half per cent, plus an advertising allowance of seven cents per case. Silzle was credited with $215,602.10 for processing, and it paid EOP the difference between $215,602.10 and $300,206.65, Sunkist's selling price for the resultant juice. Silzle thus paid $90,004.55 for the 6,675 tons of oranges exclusive of oil and peel, or at the rate of $13.58 per ton for by-product oranges. The average soluble solids content of the oranges processed by Silzle under the 1951 contract was one hundred and twenty pounds of soluble solids per ton. The Sunkist published selling price in 1951 for by-product oranges containing one hundred and twenty pounds of soluble solids per ton was $40.00 per ton. Silzle thus acquired oranges from EOP, exclusive of the peel and oil content, at a price which was $26.42 per ton less than Sunkist's published selling price for oranges of the same quality.

Under this contract EOP was to get the value of the oil and peel, which amounted to $4.08 per ton. Thus, the total amount EOP received for the by-product oranges processed under the Silzle contract was $17.66 per ton, namely, $13.58 per ton paid by Silzle, plus $4.08 per ton received for the oil and peel; or a price which was $22.34 per ton less than the price for which the same quality of oranges was available for sale by Sunkist to other independent processors, including appellees. Unlike TreeSweet, Silzle was to pack juice only for current sales, not for inventory.

The terms of the various contracts are definite. The contracts themselves are in evidence, and their execution is admitted by the pleadings.

The question permitted to go to the jury for determination was why Sunkist, in 1951, sold to one processor of "single strength Valencia orange juice" at one price, and failed to sell to another at any price. If there *was* a refusal, was it a valid exercise of business judgment? If so, it was lawful. If it was a contract made to restrain competition or to fix prices, or, from a position of legal monopoly, was used illegally to monopolize or to attempt to monopolize, then appellees were entitled to recover damages proximately resulting from appellants' illegal acts. Such questions obviously would ordinarily be questions of fact.

6. The Alleged Refusal to Sell

We have observed above, with respect to the "sixth act" of the "six acts" mentioned hereinbefore (II(f), *supra*), that Sunkist denied any refusal to sell to appellees, but admitted no contract had been made with them.

The right to offer to sell or buy with perfect freedom, and to refuse to sell or buy with the same freedom, is supposedly a fundamental right sought to be protected by our competitive free enterprise system, and by the antitrust laws.

Its legality has been primarily established by what has been described as one of the ten leading cases in antitrust enforcement during its seventy year history: *United States v. Colgate*, 1919, 250 U.S. 300. Speaking for a unanimous Court, Mr. Justice McReynolds there referred to the long recognized right of a manufacturer to exercise his independent discretion as to

parties with whom he would deal.[5] But like so many generalizations, the "right" to exercise independent discretion cannot be taken as an absolute.[6]

Mr. Justice Burton so stated in *Lorain Journal v. United States*, 1951, 342 U.S. 143, 155.[7] As Mr. Justice Holmes said: "But the word 'right' is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."[8]

We speak here only of decisions arrived at unilaterally, *i.e.*, the decisions of the single trader. Any notion that such a right to select customers by joint action exists has been laid to rest.[9] *Klor's* has reduced this prospect to a mirage.[10]

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[5]"The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell." 250 U.S. 300, at 307.

[6]We discuss the problem without considering the immunities defendant allegedly acquired under both the Capper-Volstead and Clayton Acts. We also note that the general statement in Colgate has reference to a right as it exists under the Sherman Act. More than that was originally plead in this case, but the Robinson-Patman Act violations were dismissed and were not before the jury.

[7]Cf. Rifkind, Division of Territories, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 127, 130 (1954).

[8]Amer. Bank & Trust Co. v. Federal Bank, 1921, 256 U.S. 350, 358.

[9]Klor's v. Broadway-Hale Stores, 1959, 359 U.S. 207.

[10]Oppenheim, Selected Antitrust Developments, 15 A.B.A. Section of Antitrust Law 37, 54 (1959).

Confining our attention, then, to the decision made by a single trader, irrespective of any statutory immunities, we ask whether the seller may select with whom he may deal. Whether we label it a right or a privilege, both common law[11] and statute[12] have consistently adhered to the general theory expressed in *Colgate*. Late Supreme Court cases confirm its existence,[13] but with certain definite limitations.

Text writers tell us this general "right" of choice of dealing may be violative of antitrust laws when it is "misused or abused," *i.e.*, "when there is proof of any one of a number of plus elements of liability that may taint the otherwise lawful individual refusal to sell."[14] "These plus elements," says Professor Oppenheim of Michigan,

> "include, among others, the following major species of illegality: (1) tortious conduct constituting unfair competition or unfair trade practice at common law; (2) violation of a civil rights statute or other type of constitutionally valid statute limiting refusals to deal; and (3) conduct otherwise

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[11]4 Restatement, Torts § 762.

[12]15 U.S.C. § 13(a) (1958).

"Section 2(a) of the Robinson-Patman Act, 15 U.S.C. Section 13(a), contains a proviso 'That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade.' In Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55 at 64 (1959), the Court stated that this proviso codifies the rule of United States v. Colgate & Co., 250 U.S. 300 (1919). . . ." Oppenheim, op. cit. supra note 10, at 43.

[13]Handler, Recent Antitrust Developments, 14 Record of the Bar Association of the Bar of the City of New York 318 (1959).

[14]Oppenheim, op. cit. supra note 10, at 43.

in violation of the Sherman Act, Clayton, Section 5 of the Federal Trade Commission Act or any applicable state antitrust statute."[15]

But the decisions in past years,[16] as well as recent dicta by the Supreme Court,[17] warrant the generalization made by a writer with which this Court agrees: "[*An*] *individual refusal to deal is preserved wherever*

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[15]Oppenheim, op. cit. supra note 40, at 43-4.

[16]Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Saulnier, Achieving Price Stability as a Basis for Economic Growth in a Free Society, 15 Bus. Law 83 (1959).

United States v. Parke, Davis & Co., 1950, 362 U.S. 29, emphasized the narrowness of the path of legality a seller must follow in utilizing the doctrine of United States v. Colgate in suggesting resale prices to customers. Relying on U. S. v. Bausch & Lomb Co., 1944, 321 U.S. 707, Federal Trade Comm. v. Beech-Nut Co., 1922, 257 U.S. 441, and Dr. Miles Medical Co. v. Park & Sons Co., 1911, 220 U.S. 373, the Court ruled there were two types of action prohibited by Colgate: (1) agreements or contractual arrangements on a vertical plane, and (2) a concerted plan of action on a horizontal plane.

"In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy." United States v. Parke, Davis & Co., supra at 43.

The unilateral right to set prices, without "other means" of implementation, leaving the person affected the right to accept or reject the fixed price, is maintained from Colgate, and approved. Cf. also George W. Warner & Co. v. Black & Decker Mfg. Co., 2 Cir. 1960, 277 F.2d 787.

[17]Justice Black in Klor's specifically said: "This is not the case of a single trader refusing to deal with another; . . ." (citing United States v. Colgate, supra; United States v. Schrader's Son, Inc., 1920, 252 U.S. 85; U. S. v. Bausch & Lomb Co., supra; Lorain Journal v. United States, supra). Klors v. Broadway-Hale Stores, supra at 312.

it is reasonably ancillary to the effectuation of lawful marketing objectives."[18] (Emphasis added.)

Entirely apart from a unilateral refusal to sell or deal, we have charged herein as a conspiracy, the joint or concerted refusal. "Concerted refusals by traders to deal with other traders" are equated to "group boycotts" by the most recent Supreme Court decision on the subject.[19] They "have long been held to be in the forbidden category."[20] The Court goes on:

> "They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality.' *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457, 466, 467-468. Cf. *United States v. Trenton Potteries Co.*, 273 U.S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 213, 'such agree-

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[18]Oppenheim, op. cit. supra note 10 at 44. See Associated Press v. United States, 1945, 326 U.S. 1. Professor Oppenheim goes further: "Indeed, the cases support an even broader generalization. In the absence of one of the plus illegal elements previously summarized, a seller acting alone is not required by law to justify his refusal to deal. His motive is immaterial unless it is relevant to one of the plus elements mentioned." Cf. Times-Picayune v. United States, 1953, 345 U.S. 594, 625; Timberg, Selection of Customers, in Van Cise and Dunn, How to Comply With the Antitrust Laws, 117, 119 (1954), citing Fed. Trade Comm. v. Raymond Co., 1924, 263 U.S. 565.

Also cf. Oppenheim, Developments in Antitrust Law During the Past Year, pp. 29-33, American Bar Association Section of Antitrust Law (1960).

[19]Klor's v. Broadway-Hale Stores, supra at 212.

[20]Klor's v. Broadway-Hale Stores supra at 212.

ments, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. Cf. *United States v. Patten*, 226 U.S. 525, 542." *Klor's v. Broadway-Hale Stores*, 1959, 359 U.S. 207 at 212.

Thus, in this case, we conclude the question as to whether there had been a concerted refusal to sell, as alleged by appellees, or an illegal unilateral refusal to sell, were questions of fact for the jury's determination. The jury's verdict could have been based on either (1) the alleged illegal conspiracy and agreement to make contracts constituting a restraint of trade, or (2) the alleged illegal sole trader decision not to sell, made with an intent to illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, with an intent or purpose to eliminate a competitor. We cannot know which one or more of the theories stated were adopted by the jury in determining liability. With this in mind, we must consider the evidence and the instructions given on this phase of the case. If there exists in the record sufficient evidence to justify the action going to the jury on all three of these theories, and there were no errors in the instructions nor in the introduction of evidence, then we are bound by the jury's verdict on questions of fact.

We conclude that this was the theory under which the trial court permitted the case to go to the jury, as disclosed by the instructions themselves and the trial

court's and counsel's comments, and discussion of them, at the trial. We further conclude such submission to the jury was, in theory, correct.

B. *Was there error in instructing or refusing to instruct the jury?*

This was not an easy case in which to instruct the jury, and the instructions were necessarily many and involved.

In the instructions, the jury was first advised that a parent corporation and its wholly owned subsidiary (Sunkist and EOP, respectively) "can be guilty of combining or conspiring together to violate the antitrust laws," *i.e.*, on the theory of an intracorporate conspiracy (*e.g., Kiefer-Stewart Co. v. Seagram & Sons*, 1951, 340 U.S. 211); that acts lawful in themselves can become unlawful "when part of an illegal scheme or plan, or when used to accomplish an illegal purpose" (*e.g., Direct Sales Co. v. U.S.*, 1943, 319 U.S. 671); that the acts charged against appellants under the first or restraint of trade cause of action need not have been shown to have been done with specific intent of elimination of competition in the juice market, if those acts "actually and necessarily resulted in the elimination of such competition," since everyone is presumed to intend the natural and probable results or consequences of his conduct. *People v. Kenozo*, 1952, 109 Cal. App. 2d 793, 241 P. 2d 628; *King v. Commonwealth*, 1941, 285 Ky. 654, 148 S.W. 2d 1044.

The court then referred to the "six acts" complained of which were claimed to be the proximate cause of appellees' damage (see II(a) to (f), *supra*), and added:

> "The other contracts entered into evidence between Exchange Orange and Hyland Stanford,

Harts, Case-Swayne, Mission Dry and General Foods, also referred to as Bireley's, were offered and received for the general purpose of showing the operations of Exchange Orange and such bearing as they may have in general, but are not claimed or alleged by the plaintiffs, to be any cause of their claimed damage."

The court explained the defendants' defense.[21]

The court then instructed on monopoly power:

"The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage or to destroy a competitor is unlawful:

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[21]"It is defendants' position, first of all, that they did not have a monopoly of products oranges or a monopoly of the business of processing the oranges and selling the juice in interstate commerce. Defendants contend that such monopolies could have been lawful, if they had existed, because of the statutes relating to marketing associations, but they deny that there were such monopolies.

"With respect to lemons, it is defendants' position that whether Exchange Lemon had a monopoly of products lemons or of the business of processing and selling lemon juice, is immaterial in this case, since, defendants claim, the plaintiff was not in the lemon juice business except in a very minor way.

"In any event, defendants deny that they misused any power that they may have had with respect to products oranges or lemons.

"Defendants also deny that they violated the antitrust laws in any way. They deny they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to restrain trade and commerce in single-strength Valencia orange juice or and (sic) other citrus fruit juice processed in California and sold in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to suppress or eliminate the competition of the plaintiff.

"Defendants also deny that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to monopolize the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold

"The defendant Sunkist is permitted under the law to acquire a legal monopoly over product Valencia oranges that are available for processing into citrus juice products, including single-strength Valencia juice. Sunkist or Exchange Orange could in 1951 have legally processed all of such oranges in their own plants into citrus juice products and not made any of them available to independent processors, such as the plaintiff, TreeSweet or Silzle, if they had been able to, and cared to do so. Defendant Exchange Orange, as the processing company for the grower members of Sunkist, could also enter into lawful processing contracts with independent processors to have the oranges of the grower members of Sunkist processed into citrus juices to be thereafter sold by Sunkist as the citrus

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in interstate commerce, or that they combined or conspired with Exchange Lemon, TreeSweet and Silzle, or any of them, to exclude the competition of the plaintiff from such market.

"The defendants also deny that they and Exchange Lemon and TreeSweet and Silzle, or any of them, actually monopolized the market for single-strength Valencia orange juice or any other citrus fruit juice processed in California and sold in interstate commerce.

"With respect to the six acts complained of as causing plaintiff's damage, defendants contend that such acts were lawful and that they were not performed pursuant to any combination or conspiracy or for the purpose of restraining or monopolizing trade and commerce or for the purpose of injuring the plaintiff.

"It is also defendants' contention that they were under no legal obligation to do business with the plaintiff, and that even if defendants had had some obligation to do business with independent processors generally, there was ample justification for not doing business with the plaintiff.

"Defendants contend, finally, that what happened to the plaintiff in 1951 was caused, not by any act of the defendants, but by the general economic conditions in the citrus fruit industry and by plaintiff's lack of capital and the mismanagement of its business."

juice products of its grower members to prospective buyers thereof, including independent processors. However, such contracts must be lawful processing contracts and not devices which are resorted to pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market which is represented by such citrus juices as are processed in California and thereafter sold in interstate commerce. It is for you to decide whether the contracts which Exchange Orange entered into in 1951 with TreeSweet and Silzle, when coupled with any refusal of the defendant Sunkist or Exchange Orange, to make oranges available to the plaintiff under comparable arrangements pursuant to the combination or conspiracy charged, were lawful processing contracts, or whether they were contracts which were made pursuant to the combination or conspiracy charged and had the purpose and effect of restraining and/or monopolizing interstate trade and commerce in the citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts."

And the court reinstructed on the same subject.[22]

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[22] "Now, so that you will not be confused, let's back up. Here are co-operatives which are permitted to combine together to produce and market their fruit. The antitrust laws say that they

The court next instructed on the power to determine prices, or to exclude a competitor, and the lawful as well as the unlawful exercise of that power, and re-

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may lawfully do that, and the antitrust laws say that they shall not be in violation of any—are you sleepy down there?

"Juror Daiker: No.

"The Court (Continuing): —shall not be in violation of any antitrust law in so doing.

"The plaintiffs claim that the defendants did actually have a monopoly of product fruit through their co-operatives. The defendants say, 'We didn't have it. But, if we did, it was legal.' And the court has told you that it was legal. So there is no dispute about that.

"As the court has told you, the defendants Sunkist, Orange, and co-conspirator Lemon, could have had 100 per cent monopoly of all oranges and lemons grown in Southern California, so that isn't our problem. It is what you find happened or did not happen from there on out.

"If they had this monopoly control of products oranges, then they could not use it illegally. They could use it legally. Likewise, the plaintiff contends that the defendants conspired and combined to restrain trade and commerce, and conspired and combined to monopolize the citrus fruit market, which is something different from the product fruit.

"The question that is being left to you as jurors is not the question as to whether these co-operatives could have legally had a monopoly of all the oranges or lemons in California; there is no argument about that; the question on that phase of the case is whether or not, if plaintiff proves they did have such monopoly, did they use it legally or illegally. That is a question of fact. You are the sole judges of the facts.

"Sections 1 and 2 of the Sherman Act have both the geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of the things forming a part of interstate commerce. If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce, and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the anti-

ferred specifically to the processing contracts with TreeSweet and Silzle.[23]

After advising the jury that direct evidence of a refusal to deal with Winckler on terms comparable to those offered to TreeSweet and Silzle was not necessary, and that EOP had a legal right to refuse to

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trust laws and proximate causation, and you should proceed to the question of damage.

"Any combination effectively excluding outsiders from the business altogether is a monopoly and is unconditionally unlawful.

"No claim or contention is made herein by the plaintiff that defendants, or either of them, attempted to monopolize.

"This may be a technical distinction. There is a charge that they conspired to monopolize. That is different from an attempt to monopolize, to go back to those instructions that I gave you on conspiracy. Attempt to monopolize is something different. For instance, one individual could attempt to monopolize, without any conspiracy. But there is no charge of attempt to monopolize.

"In considering the matter of monopoly power two ingredients are of outstanding significance: the power to fix prices and the power to exclude competition.

"The words 'to fix prices,' refer to price fixing activities which tamper with or affect price structures in interstate trade or commerce.

"Whether monopoly power existed in a defendant, or defendants, and whether such power was illegally used or misused, is a question of fact for the jury."

[23]"I charge you that the defendant Exchange Orange may legally enter into a processing contract whereby Valencia oranges furnished by Sunkist or Exchange Orange may be processed into single-strength orange juice for Sunkist by an independent processor party to such contract. However, such processing contracts cannot be entered into by Exchange Orange as part of a combination or conspiracy which has the purpose or effect of fixing the prices at which single-strength Valencia juice processed by TreeSweet and Silzle for Exchange Orange may be sold or offered for sale by TreeSweet or Silzle in interstate commerce as such contracts would then be illegal contracts.

"In other words, you have got a question of fact there. Were these legal processing contracts or were they illegal? I am trying to present both sides of the problem to you."

contract with Winckler unless such refusal was some part of a violation of antitrust laws, the court gave two instructions which he characterized as summing up "what is charged and what the plaintiff must prove." It is these instructions, originally requested by defendants but modified by the court, which appellants vigorously attack as error. They read:

"(a) Defendants' No. 7

The first cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators, Exchange Lemon, TreeSweet and Silzle, combined and conspired with each other at a date unknown to the plaintiff, and entered into contracts and did certain other things in 1951 with the purpose and effect of unreasonably restraining interstate trade and commerce in canned citrus fruit juices, particularly single-strength Valencia orange juice produced in California and marketed throughout the United States, with the resultant injury and damage to the plaintiff, i.e., that Sunkist and Exchange Orange and the alleged co-conspirators combined and conspired to eliminate the competition of the plaintiff in the interstate market for canned citrus fruit juices and particularly single-strength Valencia orange juice in the year 1951, and performed certain acts pursuant to such combination and conspiracy which proximately caused damage to plaintiff.

"Unless you find, therefore, from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged—

those are the six acts, one or more of the six acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for California canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendants on the first cause of action.

* * * *

"(b) Defendants' No. 17A

The second cause of action charges that the defendants Sunkist and Exchange Orange and the alleged co-conspirators Exchange Lemon, Tree-Sweet and Silzle combined and conspired together, and performed the same six acts alleged in the first cause of action, which are incorporated by reference into the second cause, in order to monopolize the production and interstate sale of California citrus fruit juices, especially single-strength Valencia orange juice, and that pursuant to such conspiracy they actually monopolized such production and interstate sale of California citrus fruit juices, and particularly single-strength Valencia orange juice, with resultant injury and damage to plaintiff. Unless you find from the preponderance of the evidence that defendants Sunkist and Exchange Orange, or either of them, and one or more of the alleged co-conspirators, combined and conspired, and pursuant to such combination or conspiracy did one or more of the acts charged, and complained of, in order to acquire effective control of the interstate market for California citrus fruit juices, with the purpose or necessary effect of eliminating

> competition, including that of the plaintiff, from such market, your verdict must be for the defendants on the second cause of action."

Under that charge appellants urge the jury could have found that the conspiracy consisted of only Sunkist or EOP and ELP. Such a conspiracy, say appellants, involved only exempt cooperatives; that these instructions removed any exemption created by Capper-Volstead from the case entirely.

This error, say appellants, was compounded by the trial court in its attempt to clarify the charge after it had been given. In this regard the court said:

> "I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. The charge is that the defendants and co-conspirators conspired.
>
> "However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts."

Appellants' argument first presupposes that agricultural cooperatives can combine to fix prices or eliminate competitors with immunity, otherwise Capper-Volstead means nothing. With this position we do not agree.

First: We do not now understand (since the *Milk Producers* decision) that different agricultural cooperatives, combining together are entitled to claim a total immunity for acts which they may lawfully do unilaterally, any more than individuals may claim for certain of their joint actions the same immunity under

antitrust laws which would exist as to their several independent acts.

> "[A] group of farmers acting together *as a single entity* in an association cannot be restrained 'from lawfully carrying out *the legitimate objects* thereof,' but the section [Section 6 of the Clayton Act] cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will." (Emphasis added.) *Milk Producers Assn. v. U.S.*, *supra*, at 465-6.
>
> "The Capper-Volstead Act . . . extended §6 of the Clayton Act exemption . . . [but] did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain or suppress competition with the cooperative." *Id.* at 466-7.

Second: We point out that the error as allegedly compounded by the loose language ("You may find that nobody conspired, or . . . *that some number less than the total conspired.*" (Emphasis added.)) was followed by a grudging approval of such instruction to the jury by both sides, just before the jury retired:

> "[The Court:] . . . . Now, do you want to come back up again, or are you content? Is that satisfactory?
>
> "Mr. Fisher: I think we are content.
>
> "The Court: Satisfactory, Mr. Dixon?
>
> "Mr. Dixon: Satisfactory."

Third: We think there exists support in the law for such instructions. *United States v. Timken Roller*

Bearing Co., N.D. Ohio, 1949, 83 F. Supp. 2d 84 *affirmed* 341 U.S. 593 (1951). "[C]ommon ownership and control does not liberate corporations from the impact of the anti-trust laws." *Kiefer-Stewart Co. v. Seagram & Sons, supra* at 215. *But cf:* Report of the Attorney General's National Committee to Study the Antitrust Laws, pp. 30-36 (1955).

The entire instructions given cover fifty-pages of the transcript. The first ten pages and the last five were "stock instructions," applicable in any private conspiracy antitrust case where plaintiffs seek damages. Ten pages of instructions cover the pleadings, the statutes involved, the appellants' denials and defenses, and an explanation of certain evidence received, to which no objection is made by appellants.

Appellants do however, in thirty-nine specifications object to almost every one of the remaining instructions, given at the request of appellees or on the court's own motion; and to four instructions which were requested by appellants but modified by the court. Additionally, twenty-seven instructions proposed by appellants and rejected by the court, are alleged as error. Thus, there are sixty-six alleged errors in the giving or refusing of instructions. We find it unnecessary to go into each instruction individually. Some are based on the theory of exemption which *Milk Producers Assn. v. U. S., supra*, laid at rest,[24] or the "public injury" concept, buried by *Klor's v. Broadway-Hale Stores, supra*.[25] Some have to do with definition of

[24]For example, alleged errors 2(a), 2(f), 2(g), 2(i), 2(k), 2(s), 2(z) and 2(dd).

[25]For example, alleged errors 2(z) (2d para.); 3(a).

the relevant market hereinbefore discussed.[26] Some have to do with intra-corporate conspiracy.[27] Others were allegedly vague, ambiguous, or confusing,[28] or tended to "over-emphasize,"[29] or be unnecessary or needless repetition,[30] or were immaterial,[31] or focused attention unnecessarily.[32] All the foregoing objections not hereinafter touched upon we hold invalid, or of such slight consequence that they do not constitute substantial error, and are not prejudicial. Fed. R. Civ. P. 61.

Appellees, of course, urge that the instructions must be "viewed in their entirety, rather than in isolated segments"; that "even if a single instruction is erroneous, it does not call for reversal if it is cured by a subsequent charge or by a consideration of the entire charge," citing *Jesonis v. Oliver J. Olson and Co.*, 9 Cir. 1956, 238 F. 2d 307, 309. We agree with that general principle, yet if a substantial and prejudicial error is made in the giving of but one instruction, the verdict cannot stand. We therefore consider in more detail certain other alleged errors which we feel merit discussion. We refer to the following:

(1) Was it error to instruct the jury as follows (alleged error 2(c)):

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[26]For example, alleged errors 2(b) and 2(c).

[27]For example, alleged errors 2(b), 2(m) and 2(o).

[28]For example, alleged errors 2(d), 2(e), 2(h) and 2(i).

[29]For example, alleged errors 2(h), 2(m) and 2(n).

[30]For example, alleged errors 2(g) and 2(h).

[31]For example, alleged errors 2(k), 2(l), 2(m) and 2(p).

[32]For example, alleged errors 2(j).

> "The use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The objection was because (a) it assumes monopoly power existed when its existence was a question of fact for the jury; (b) it is inapplicable to a conspiracy situation; (c) the only charge of misuse of monopoly power is by conspiracy; (d) it contains no reference to substantial restraint on interstate commerce; (e) it is silent on matter of intent.

This instruction is an exact quotation from *United States v. Griffith*, 1948, 334 U.S. 100, 107. It is difficult for this Court to see how a monopolist can make any business decision without its involving and using its monopoly power, nor how it can make any sale or purchase (for example) at an advantageous price, without gaining some competitive advantage. The statement is a broad one, but there were several other instructions given which modified and tempered its broadness, and which we must assume the jury understood and followed.

We find no merit to the objections urged, in view of the instructions taken as a whole and read together, as we are required to do on this appeal.

(2) Was it error to instruct the jury as follows (alleged error 2(r)):

> "Single strength orange juice . . . sold in interstate commerce may be the subject of restraint and monopoly under the Sherman Act."

The objection was because (a) this is a question of fact for the jury; (b) which was taken away from the jury.

The question of whether substantial interstate commerce exists is a question of fact for the jury. *Marks Food Corp. v. Barbara Ann Baking Co.*, No. 16095, decided December 28, 1959, as amended, 9 Cir., ... F. 2d ..... *Cf. Beacon Theatres v. Westover*, 1959, 359 U.S. 500. But such question as to whether single strength orange juice was or was not a subject of restraint or monopoly was not, in our opinion taken away from the jury when the instructions are again read as a whole. Even considered singly, the instruction stated the jury *might*, not that it *must*, find that single strength orange juice was the subject of restraint and monopoly in interstate commerce. We hold there was no prejudicial error in this instruction.

(3) Was it error for the court to comment to the jury on the legal effect of Exhibits 84-A (plaintiff's re-organization plan, alleged error 2(aa)) and particularly the last paragraph of said comment:

> "The loss of $169,000 or $170,000 resulting from the sale of the real estate and plant referred to in the evidence should not have been taken into account during Winckler & Smith's fiscal year ending January 31, 1950 and Mr. Lynch, the expert witness for the defendants, should not have so considered it, and the court was in error in permitting him to do so in his computations."

The objection was because (a) when the loss was to be taken was not a matter of law; (b) the comment discredited appellants' expert witness, Lynch.

In view of our position hereinafter taken as to damages, error or lack of it in this instruction is immaterial.

(4) Was it error to refuse appellants' six instructions, nine to fourteen, inclusive, instructing the jury the "six acts" complained of were not unlawful (alleged error 3(b))?[33]

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[33] "No. 9

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Orange and Exchange Lemon whereby Exchange Lemon processed oranges into single strength orange juice for Exchange Orange at cost and without profit to Exchange Lemon. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was part of the conspiracy charged in the first causes of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Orange and Exchange Lemon as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 10

"You are instructed that there was nothing unlawful in the agreement or arrangement entered into in 1951 between Exchange Lemon and Exchange Orange whereby Exchange Orange processed lemons for Exchange Lemon at cost and without profit to Exchange Orange. Unless you find, therefore, from the preponderance of the evidence, that such agreement or arrangement was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such agreement or arrangement between Exchange Lemon and Exchange Orange as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 11

"You are instructed that there was nothing unlawful in Sunkist's setting its own price of by-product Valencia oranges available to independent processors at $40.00 per ton in 1951; and, unless you find, from the preponderance of the evidence, that the setting of such price was a part of the conspiracy charged in the first cause of action and was done for the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard Sunkist's setting of the $40.00 price as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 12

"You are instructed that there was nothing unlawful in the contract entered into between defendant Exchange Orange and

Each of these instructions referred to one of the six acts as being "nothing unlawful." They then went on to say that unless the acts were "part of a conspiracy" made with the purpose and effect "of eliminating competitors, you will disregard such agreement or arrangement as being of no consequence in the case." Thus, in effect, the act "X" was lawful, unless you find it was done in unlawful conspiracy. These instruc-

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alleged co-conspirator TreeSweet Products Company, effective as of July 23, 1951; and, unless you find, from the preponderance of the evidence, that such contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator TreeSweet Products Company, as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 13

"You are instructed that there was nothing unlawful in the contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, effective June 20, 1951, and, unless you find, from the preponderance of the evidence, that this contract was a part of the conspiracy charged in the first cause of action and was made with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard such contract between defendant Exchange Orange and alleged co-conspirator E. A. Silzle Corporation, as being of no consequence in this case, so far as the first cause of action is concerned.

"No. 14

"You are instructed that there was nothing unlawful in the refusal of defendant Exchange Orange to enter into processing agreements with plaintiff for processing Valencia oranges during the 1951 season comparable to the contracts entered into between defendant Exchange Orange and alleged co-conspirators TreeSweet Products Company and E. A. Silzle Corporation; and, unless you find, from the preponderance of the evidence, that such refusal was a part of the conspiracy charged in the first cause of action and was done with the specific purpose to eliminate and with the effect of eliminating the competition of the plaintiff in the interstate market for canned citrus fruit juice, you will disregard the refusal as being of no consequence in this case, so far as the first cause of action is concerned."

tions were confusing. In view of all instructions given, and the nature of the case, we cannot hold the failure to give them just as requested by defendants and appellants, constituted prejudicial error.

(5) Was it error to give the court's own instruction E (alleged error 2(y))[30] because of the court's ruling excluding so-called "after-acquired" information with respect to appellees' alleged watering of juice?

This again can better be decided under a discussion of errors charged with respect to the introduction of evidence.

(6) Was it error to fail to instruct the jury as to necessity of *"specific intent"* to eliminate a competitor in the first cause of action, and to exclude appellee as a competitor in the second cause of action (alleged errors 3(m), 3(n))? Appellants rely on *United States v. Griffith, supra*, and *Times-Picayune v. United States*, 1953, 345 U.S. 594, in support of both of their proposed instructions (nos. 8, 18).

> "It is, however, not always necessary to find a specific intent to restrain trade or build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.
>
> . . . Specific intent in the sense in which the common law used the term is necessary only where

[30] "The refusal of EOP, if such you find, to give a contract to plaintiff similar to the Silzle and TreeSweet Contracts must be judged on the basis of the evidence and instructions in this case and upon such knowledge and information as EOP and its officers, agents and employees had at the time of such refusal, if any, and not upon the basis of facts or information thereafter discovered or ascertained by EOP."

the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in *Swift & Co. v. United States*, 196 U.S. 375, 396:

> 'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. *Commonwealth v. Peaslee*, 177 Massachusetts 267, 272. But when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.'
>
> * * * *
>
> "Hence the existence of power to exclude competition when it is desired to do so is itself a violation of [Sherman Act] §2, provided it is coupled with the purpose or intent to exercise that power." *United States v. Griffith, supra* at 105-7.

Thus we find it not necessary to find a specific intent to restrain trade or eliminate a competitor or to create a monopoly. It is necessary to find that the restraint of trade or monopoly results as a consequence of the critical act, and that such act was done with the specific intent of accomplishing that act, when the actor acts from such a position that the natural result or necessary effect accomplishes the proscribed act. The actual result need not be the object of the specific intent.

We therefore rule that there was no error in refusing the appellants' proposed instructions 8 and 18 (alleged errors 3(m) and 3(n)). *Cf. Times-Picayune v. United States, supra* at 614, where the Court said:

> "The . . . contracts must be tested under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of §1 '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint, or because it falls within the class of restraints that are illegal *per se*.' *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948).
> * * * *
> "[I]t '[is] unreasonable *per se* to foreclose competitors from any substantial market.'" *Id.* at 608.

Mr. Justice Clarke in *Times-Picayune* then goes on:

> "Since the requisite intent is inferred whenever unlawful effects are found, *United States v. Griffith*, 334 U.S. 100, 105, 108 (1948); *United States v. Patten*, 226 U.S. 525, 543 (1913), and the [tying cases] rule of *International Salt* is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect." *Id.* at 614.

In conclusion, we find no reversible error in the instructions, other than error that need not be considered in view of our ruling as to damages, hereinafter to be discussed.

C. *Was there error in rulings on admission and rejection of evidence?*

1. *As to Liability*

Appellants urge that much evidence offered by them was wrongfully excluded by the trial court. They charge that this evidence went not only to the measure of damages, but to causation and liability. Motions for a directed verdict and for judgment *non obstante veredicto* were made, not only upon the grounds that plaintiffs had failed to prove (a) any conduct outside the agricultural cooperatives' exemptions; (b) any combination or conspiracy to restrain trade, or (c) any monopoly control or capacity or intent, but also upon the grounds (d) that plaintiffs had failed to prove injuries proximately resulting from any act of defendants, or (e) the amount of any damages claimed to have resulted to plaintiffs.

When Winckler asked in his second conversation with Finley for a contract similar to the TreeSweet and Silzle contracts, he was told he could not have the same type of contract. "I told him I . . . was having plenty of trouble . . . with those, we did have contracts with wanting more fruit, rather than less fruit, so I just couldn't give him a contract and cut off our old customers."

Appellants sought to introduce evidence "heard from others in the industry" that Winckler & Smith's juice was regularly watered and adulterated, and was of poor and inferior quality, and that such facts were in defendants' corporate "mind" when it refused to deal with Winckler & Smith in 1951, and this excused its "refusal" to so deal. This, of course, was, if ad-

missible, material not only on the issue of liability, but also on the nature and extent of damages that proximately resulted from any liability found.

The difficulty with appellants' position with respect to admissibility on the question of liability was that specific information as to such "watering" had not reached the appellants at the time of their "refusal" in 1951. They had suspected that such facts existed; there had been rumors thereof, but no substantiation amounting to proof. We take it if a person charged with making a decision (which may or may not be a violation of law, dependent upon the intent and purpose and effect which accompanies it) is willing to rest such decision on surmise, suspicion, conjecture, and intuition, he has that right, but o acts at his peril. He may be called upon to justify it. Subsequently discovered facts cannot be introduced to fortify the strength of the facts upon which such previous surmise, conjecture and suspicion was based, but subsequently discovered facts could be utilized as a defense to the amount of damages claimed to have proximately flowed as a result of defendants' actions, whether such facts were known or unknown at the time the decision was made.

Appellants offered to prove "a statement by a former sales manager of Winc r & Smith Company, who, when asked whether Winckler was watering his product, this fellow said, 'I don't know, because I was instructed never to go into the plant.'" If we assume that this alleged statement goes *beyond* the expressed lack of factual knowledge it discloses on its face, and if it does purport to express a fact, it was not offered to establish the truth of the facts it purportedly contained,

but the condition or state of Finley's mind when he talked to Winckler.

Appellants' offer of proof went farther than to show a condition of mind. It was that Finley would testify that Charles Sisk, when asked if Winckler & Smith watered their products, said to Finley:

> "I couldn't prove it in court, but I am sure they do. Winckler, though, ordered me strictly never to go out in the plant, and I was never allowed in the plant while I was sales manager."

Again this expressed an unprovable opinion[35] in a third person that watering of the orange juice took place. But it was offered, not to prove watering, but that such a statement had been made to Finley—a statement that might affect his state of mind. In refusing the offer, the court ruled not that it was inadmissible to prove the state of mind, but was inadmissible as hearsay. The court stated:

> "Objection sustained as to conversation with Charles Sisk, the former sales manager. *If you want to bring Sisk in, we will cross that bridge at that time, as to what he can testify to.*" (Emphasis added.)

Part of the offer made was to show that at the price Winckler & Smith sold certain Arizona grape-

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[35]Part of the offer of proof was not only that certain persons had the opinion the Winckler & Smith juice was watered, but that "there is no analytical method known by which it can be determined whether water, sugar, or acid have been added to natural juice in order to compare that with the finished product. It is only possible to determine whether adulterants of that sort have been used by comparing an analysis made before [adulteration] and an analysis made after." Appellees, apparently surprised at this offer of proof, did not dispute its accuracy, but its admissibility.

fruit juice, it could not make a profit. From this Finley concluded that water and sugar must have been added. As the trial court pointed out, another conclusion of equal validity would be that the sales were made by Winckler & Smith at a price which lost it money. Many factors, such as amount of stock on hand, finances of the company selling, or a dozen other factors might have brought about a sale at a losing price—and none of such reasons would be the basis for a conclusion that the juice was watered.

The trial judge concluded that the offer did "nothing but add and inject into the case other issues," and sustained the objection. Additionally, the offer was refused because the same witness, Finley, had testified the reason for his refusal to sell to Winckler was that he was having trouble with his existing contracts, because of a shortage of fruit. Or, as the trial court stated it, "because of the capacity that was involved." Of course, if Finley had more than one reason for refusing to deal with Winckler, he had the right to detail it, or them, to the jury. That he rested on but one explanation under cross-examination by plaintiff-appellee is no reason he could not have enlarged his reasons on direct examination. This presents a serious question as to whether error was not committed by the trial court. However, the court gave a further reason why he would not admit such evidence. The court ruled as follows:

> "I have already sustained the objection to similar matters on the further ground it is an issue that was never called to the attention of the court, was not listed as an issue that you intended to produce

> at this trial, was raised for the first time during the trial, and my previous comments on objections will be incorporated here at this point."

An examination of the pre-trial proceedings contained in the transcript before us indicates the court's statement as to issues raised was correct. We are inclined to think the ruling made was within his general judicial discretion as to the method of trial of the case, at least on the issue of liability, particularly in view of what the court did permit counsel for appellants to introduce into evidence.

Counsel for appellants presented evidence mentioned in his offer of proof which had not been ruled out by the trial judge. Finley, to show his state of mind in 1951, testified (a) to his unsatisfactory experience with Winckler in 1947 (when Finley had helped Winckler with scarce cartons, only to have Winckler's promises unfulfilled, with a subsequent recovery to Sunkist of eleven cents on the dollar; (b) to his unsatisfactory experience with Winckler & Smith in 1947 on the purchase of hot concentrates—"high yeast and bacteria count—poor pasteurization"; (c) his dissatisfaction with the Citromats (orange squeezing machines) used by Winckler & Smith prior to 1951. The following question was then asked of Mr. Finley, still on direct examination, and he gave the following answer:

> "Q. Mr. Finley, at any time in 1951, assuming that you had had a surplus of fruit available for processing, would you have been willing to enter into any kind of a processing agreement with the Winckler-Smith Company?
>
> "A. I would never have entered into a processing agreement with the Winckler-Smith Company."

No additional offer of proof, nor any attempt to introduce evidence was made by appellants. We can find no ruling of the trial court on the issue of liability that constitutes error so prejudicial as to constitute reversible error.

2. *As to Damages*

This brings us to the matter of Exhibits I-1 to I-4, identified by witness Opal Smith (a laboratory technician employed by Winckler & Smith, as Opal Comstock, in 1949 until 1952, inclusive) as "Daily Laboratory Statistics" maintained by Winckler & Smith at their Anaheim plant, delivered to Mr. Winckler's desk.

As an example of her testimony, this witness testified that on one day the acid test in the raw juice was 1.54%; while in the canned product it was 1.27% acid. This change in acidity, said the witness, was accomplished by the addition of water.

Appellees took the position that the information disclosed by these records was not known to Sunkist when its Mr. Finley refused to contract with Winckler; that the fact of adulteration thus could not have entered into the refusal to contract and was therefore immaterial. This position was taken by appellees, despite the testimony of the surmise or conjecture or conclusion of Sunkist's officer that the Winckler product was watered. If this evidence were offered solely for the purpose of explaining Sunkist's refusal, or adding a second reason for the refusal, it is conceivable that the records offered, at the then state of the record, would not be material, *i.e.*, were what counsel for appellees described as "after the fact evidence," a phrase adopted

by the trial judge. For that reason, we are not prepared to rule that the exclusion was error, if the limited purpose of offering the evidence was to show Finley's state of mind.

But such evidence was offered additionally for two separate purposes—to impeach the plaintiff Winckler as to his knowledge as to whether or not his products were adulterated (as well as prove the fact of adulteration), and secondly, it was offered on the question of damages—to show the Winckler & Smith product was an inferior and not a "Grade A" product, as Winckler had testified.

And, of course, if admissible for any purpose, the documents should have been admitted. *Petroleum Carrier Corp. v. Snyder*, 5 Cir. 1947, 161 F. 2d 323; *Estate of Clark*, 1949, 93 Cal. App. 2d 110, 116, 208 P. 2d 737, with necessary precautionary instructions requested and given to the jury.

The trial judge originally saw the admissibility of such evidence on the issue of damages. But he saw difficulties in any effort which defendants-appellants might make to show (a) complaints by dissatisfied users that the product was watered; (b) loss of sales due to adulteration.

Counsel for appellants stoutly maintained he could produce such testimony, and stated: "getting back to the causation question . . . whether his product was good or bad has a bearing on why he went out of business."

Counsel for appellants urged that in view of Mr. Winckler's previous testimony that "Fancy" and "Fancy California" were the equivalent of Department of Ag

riculture "Grade A Fancy," this evidence was admissible, for Mr. Winckler had testified that under the government definitions of orange juice, a citrus product that is sold as orange juice contains no ingredient other than the juice extracted from fresh fruit; and that sweetened orange juice contains no ingredient other than the juice with dry sugar added.

Counsel for appellants further offered to prove that Winckler & Smith added tap water to the juice, rather than "merely" condensate. Winckler had denied he had done this, and agreed that "introducing tap water" was not permissible.

Counsel for appellants further offered to prove that the records offered "were regularly shown to Mr. Winckler, they bear his initials showing he has seen them. By one witness I will show they discussed this practice of adding water to these products."

The trial judge then discussed the admissibility of these records at some length. He commented on the lack of reference to the exhibits at the pre-trial; the "obvious purpose of this evidence is to bootleg into the record after-knowledge which the defendants did not have"; the possibility of using the records for impeachment, and if so, what his duty would be in that regard;[36] and further stated:

> "[T]his matter of taking an exhibit that might be admissible for one small purpose and tossing it in a case where it can have the effect of being

[36] "[B]ut if it does go into evidence as impeachment, the jury will certainly be told, and told in no uncertain terms what it will not be considered for, and when I get through telling them what it is not being considered for, I am afraid that the exhibit will not be as effective as the defendants think it might be."

used for a different purpose presents a problem. It presents a problem to the Court in its right to control the admissibility of evidence in a case.

* * * *

"An offer that you made injects issues in this case where this case could go on forever."

The court then sustained the appellees' objections. On its admissibility on the question of damages, very little was said.[37]

We think the evidence was clearly admissible on the issue of damages, particularly in view of the specific terms of the offer with respect to causation, and specifically, dissatisfied users with resultant loss of sales. Such evidence was material, and we must assume the appellants were able to produce it, had they been allowed to do so. We find the exclusion of such evidence was error. While it remains a close question as to whether this error is not prejudicial to the issue of liability, we believe that its exclusion might come within the trial court's discretion as to the control of evidence as to collateral issues. We therefore do not hold it was prejudicial error on the issue of liability. On the other hand, we find it clearly was prejudicial on the issue of damages.

The same conclusion applies to the proffer of proof by appellants of testimony by the witness William Rodgers, former plant superintendent of Winckler &

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[37] "As to the question of damages, that they would go to the question of damages, or causation, alleged inferior product; we are not trying a Food and Drug case.

"As far as we know, maybe people liked orange juice with water in it as well or better than orange juice without water in it, assuming that you could prove that tap water was put in it."

Smith, that that witness had observed that single strength orange juice had been stretched by the addition of water and other additives to the extent of approximately twenty per cent—and that Mr. Winckler knew of this addition, and was satisfied to let it continue.

Appellants likewise claim error in restrictions placed upon them by the court's rulings preventing them from exploring Winckler & Smith's earlier business history —prior to 1951—or its alleged under-capitalization and inefficient operations; the court's position that losses reported for income tax purposes did not necessarily mean actual business losses; the court's refusal to admit Winckler's letters in 1951 explaining his inability to deliver juice due to other reasons, and the court's rulings respecting witness Hodge's mythical 12,000 tons theory of loss, and the appellants' attack thereon.

Appellants point out, as most important rulings against them, the following:

(1) Appellants sought to show that after the Chapter X reorganization, Mr. Winckler and other stockholders had withdrawn some $250,000 from the company in a two and one-half year period by way of salary, bonuses, debt forgiveness, and rentals. Appellees' objection was that this line of proof was "wholly irrelevant and immaterial . . . and not tending to prove or disprove any of the issues of this lawsuit." The objection was sustained, with the comment that appellants could prove the condition of the company in 1951. Later, the trial court relaxed this ruling somewhat to permit interrogation as to salary, allowances and bonuses paid Mr. Winckler in 1949, 1950 and 1951, but not in other years; and he still

excluded Exhibit B1 which summarized the figures in the three years mentioned.

(2) While admitting evidence of the ultimate fact that Mr. Winckler had been forgiven a $38,000.00 indebtedness owing the corporation, the court excluded any breakdown of that figure. It was sought to show by this breakdown that substantial amounts of corporate funds were expended to enable Winckler to buy out one of the company's stockholders; and that the corporation, through its Chapter X receiver objected to the former's claim in this regard. The objection to this evidence was not clearly expressed, but seems to have been irrelevancy and "that the representation could not be supported by this witness [Mr. Lynch, appellants' accountant]." The objection, whatever it might have been, was sustained.

(3) Appellants were not permitted to show that in 1949 and 1950—the two years claimed by plaintiff to have been profitable ones—Winckler & Smith filed income tax returns showing a net loss, rather than a profit, in each of those years. The objection to this testimony stated no grounds—it was merely "I object to any inquiry along that line." That "objection" was sustained. Later appellees' counsel spoke of it being out of order, in the middle of the trial, to require plaintiff to produce further records, *i.e.*, the tax return for 1949; and the "objection" was again sustained on the ground the request came too late, and it would be going into extraneous issues. However, copies of state or federal returns for 1949, 1950 and 1951, with supporting schedules, had long since been identified by Mr. Winckler. And when those copies were offered in evidence they were excluded, the objection

then being irrelevancy. Furthermore, when the court's attention was called to the fact that the 1949 return had been requested in appellants' pre-trial discovery long before the trial, he declined to change his ruling.

(4) It was appellants' theory that in calculating the loss or gain from the mythical 12,000 tons, as well as to arrive at the true cost of fruit under a Tree-Sweet type arrangement, it was necessary to take into consideration the returns from oil and peel which, under such an arrangement, would have belonged to EOP. Accordingly, they prepared computations which took that factor into account and which showed that the cost of the fruit would be considerably more than Mr. Hodge's calculated figure and that the result, *vis-a-vis* processing of the 12,000 tons, would have been an additional loss. They also sought to have their accountant witness testify that this factor was omitted in Hodge's computations. The effort proved fruitless. The trial judge, largely on his own motion and for the reason that he thought appellants' theory to be illogical excluded the proffered evidence, both oral and documentary, on this subject. At first the trial judge indicated that he would exclude it only as direct rebuttal of or comparison with Plaintiffs' Exhibit 69-A in which the results of Hodge's theory were incorporated. Ultimately, however, he excluded the evidence entirely.

(5) A number of letters issued by Winckler & Smith were offered as containing statements, *i.e.*, admissions, showing that in 1951 its inability to furnish orange juice was due to the short California supply of fruit, heavy local bookings by Winckler & Smith, or excessive Florida inventory which had driven prices down

No objection was made as to foundation or authenticity; but it was objected that the person signing the letters had testified earlier. The objection was sustained.

Without going into precise details as to which portions of this evidence to which objections were sustained should have been admitted, we can say that we believe appellants were denied a fair opportunity to present their defense on the issue of damages to the jury. For example, income tax returns are frequently admissible, even though capable of being explained away. *Koche v. Commissioner*, 5 Cir. 1933, 63 F. 2d 623; *United States v. Farrell*, D. Conn. 1929, 35 F. 2d 38, and the business experience and operations and profits of previous years are not always, or necessarily, inadmissible.

The obligation is on a plaintiff in a Sherman Act case to prove damages recoverable in an action at law. *Locker v. American Tobacco Co.*, 2 Cir. 1914, 218 Fed. 447.

It cannot be said that the erroneous exclusion of evidence directly bearing on damages would not have affected the verdict. The error is therefore presumed to be prejudicial. "[A]n erroneous ruling which relates to the substantial rights of the party is ground for reversal unless it *affirmatively* appears from the whole record it was not prejudicial." *McCandless v. United States*, 1936, 298 U. S. 342, 347-8.

While a great deal of leeway is granted a jury in assessing damage once the fact of injury has been established, the damages alleged must be established as a direct and proximate result of defendant's violation of

the Sherman Act with reasonable certainty. *Story Parchment Co. v. Paterson, etc. Paper Co.*, 1931, 282 U. S. 555, 562; *Flintkote Company v. Lysfjord*, 9 Cir. 1957, 246 F. 2d 368; *Wolfe v. National Lead Co.*, 9 Cir. 1955, 225 F. 2d 427, 431.

Plaintiffs-appellees introduced by means of the expert testimony of Mr. Hodge evidence of alleged loss of profits. This loss was based upon several presumptions:

First: That 12,000 tons of Valencia oranges were available to appellees;

Second: That the amount of juice taken therefrom would have produced a certain amount of canned juice, which would have been sold at a certain price, *i.e.*, the same price Sunkist charged TreeSweet *before* discount and allowances;

Third: That processing and other costs to Winckler in 1951 would be the same in 1951 as they were in 1949.

The evidence was that Winckler & Smith usually had received less for its orange juice than the price Sunkist usually received. There was evidence the equipment used by Winckler & Smith was not as efficient and modern as that of other canners. The demand for its juices was surely not as heavy as the demand for Sunkist brands or TreeSweet juice. The number of its single strength juice customers was known to have declined substantially in 1950 over 1949.

But beyond all the foregoing, if such difficulties as to proof of damages were overlooked, a further assumption would be required, that the lack of dealing by Sunkist with Winckler & Smith was a proximate

cause of the loss of Winckler & Smith's plant and business.

We need not go so far as to class this case with *Wolfe v. National Lead Co., supra,* where there was no proof of damage, and therefore dismiss the case. There this Court noted that the plaintiffs below

> "ask the court to disregard the apparent probative effect of their net profit figures [of their entire business] . . . and to consider only that portion of their business relating to titanium pigments. In this, they seek to have the court isolate the titanium pigment portion of their business and consider it separate and apart from their other operations. In this way, they attempt to establish the fact that they received a higher return on the titanium pigment . . . in 1949 than they were able to secure in 1947 and 1948." *Id.* at 430.

Here, if we substitute "Valencia oranges suitable for single strength juice" for "titanium pigments," the language is apt.

The record shows that in 1950, the year previous to the one here involved, the oranges sold to Winckler & Smith by Sunkist amounted to but 1.54% of the total used by Winckler & Smith. From 1948 on, Sunkist had never supplied more than 18%. The balance had been secured from other suppliers, principally Morgan Ward. In 1950, the number of oranges sold by Sunkist to Winckler & Smith was reduced to a mere trickle —1.54%. This was not claimed to be a proximate cause of the loss of the plant. Yet when Sunkist "refused" to sell 1.54% of the total to Winckler & Smith, and other producers refused to sell a larger

percentage, appellees contend that *the sole* proximate cause of the damage suffered, including the loss of the plant, was the appellants' so-called "refusal."

At the time the plaintiffs below requested oranges from Sunkist the encumbrance on the Winckler & Smith property was in default and a sale on account thereof already set. Thus the loss of the plant, on the evidence in the record before us, becomes collateral, remote and conjectural. *Savings Bk. of So. Cal. v. Asbury*, 1897, 117 Cal. 30, 48 Pac. 1081; *Hartman v. Rogers*, 1886, 69 Cal. 643, 11 Pac. 581; *De Lierè v. Goldberg Bowen & Co.*, 1916, 30 Cal. App. 612, 159 Pac. 197. Whether it will remain so on a new trial of the issue of damages, we do not here pass upon.

Appellees' proof as to loss of the plant rested on the testimony of Robert Hodge. He just testified that from 1946 to 1949, the company apparently lost $224,000 plus. The net worth of the company was $30,000 on July 31, 1949. From February 1, 1949 to June 31, 1950, the company increased its net worth to $137,000. Operating from February 1, 1950 to January 31, 1951, there was an operating profit of $40,000. From February 1, 1951 to July 31, 1951, there was a loss of $152,000.

On April 16, 1951, the Winckler & Smith Company exercised its option to repurchase the plant which it had previously lost. The company issued 20,535 shares of its preferred stock, paid $17,325 in cash, assumed $50,499.04 on the mortgage, and listed its fixed assets at $721,000 plus, making a capital surplus of $343,000 plus. Exhibit 65 showed that for the year ending January 31, 1952, $156,000 in sales were from Florida

processed products, and $528,735.91 from California operations, with a loss of $184,523.20 due to "less sales in 1952" and "continuing overhead."

Mr. Hodge, the expert witness, was a Certified Public Accountant. He was not familiar with the accounting of any juice processor other than Winckler & Smith. But he was allowed to testify that if 12,000 tons of fruit had been made available to Winckler & Smith by anyone on the same terms as was made available to TreeSweet, then *based on the 1949 and 1950 operations of Winckler & Smith*, it would have had a profit of $10,000 in the year ending January 31, 1952. This hypothetical question excluded any reference to conditions in the industry generally in any year, or even to operations of Winckler & Smith in 1951. In explaining his answer, the witness stated he *excluded* Winckler & Smith's processing costs for 1950, but used only 1949 costs. He used general administrative costs of 1949. He then deducted, not selling costs *per ton*, but "Winckler & Smith's actual selling cost *in the year 1952* as shown in my report, of $87,652.40." (Emphasis added.)

Computed on the same basis, if 15,000 tons had been sold by Sunkist to Winckler & Smith, the profit would have increased from $10,231.45 to $54,020.45.

Without going into the credibility of such testimony, or the restrictions placed upon his cross-examination by the court's rulings on evidence, or any particular matters he testified to (as for example, the matter of deferred charges which though actually paid in one year were placed for bookkeeping reasons in another), we fail to find in the hypothetical statement of facts upon

which the opinion of this expert was based that fair statement of all the facts in the case which is required as a basis of any hypothetical question. *Fort Worth & Denver Railway Company v. Janski*, 5 Cir. 1955, 223 F. 2d 704; *Dairymen's Milk Co. v. McCormick Co.*, 3 Cir. 1940, 114 F. 2d 736.

We are completely satisfied that the question of appellees' damages, as presented to the jury, rested upon surmise, conjecture, and guess work, and that the amount found as damages was not logically or legally inferrible from the facts in evidence before the jury. The expert opinion was a guess based on conditions contrary to fact. It was, in reply to the hypothetical question, too speculative to be admissible. *Baush Mach.-Tool Co. v. Aluminum Co. of America*, 2 Cir. 1935, 79 F. 2d 217, 227; *Carroll v. Magnolia Petroleum Company*, 5 Cir. 1955, 223 F. 2d 657.

We are satisfied that the jury's determination of liability must be affirmed, and its determination of the amount of damages reversed.

D. *Was there error in affixing attorneys' fee of $195,000?*

While it is the duty of this Court "to protect against vicarious generosity in the matter of attorneys' fees" (*Twentieth Century-Fox F. Cor. v. Brookside Th. Corp.*, 8 Cir. 1952, 194 F. 2d 846, 859), we cannot say as a matter of law that in a case like this, tried at great length below; argued twice on this appeal; and now to be reversed partially so that a new trial must be had below on the issue of damages, that before counsel for appellees obtain satisfaction of judgment for their client that $195,000 as attorneys' fees is too large

a sum, or a figure that would shock the conscience. We do not know what amount will be recovered by appellees on a second partial trial below. When that is determined, finally, the sum heretofore awarded as attorneys' fees may be too large, or conceivably, too small. We cannot prognosticate, nor guess. We do not reach that issue. It can be raised below by either side, and if necessary, on subsequent appeal. We will not now disturb it, but assume that on remand the correct amount will be in issue below.

The judgment heretofore rendered on the jury's verdict is affirmed on the issue of liability, and reversed and remanded on the issue of the amount of damages.

(Endorsed) Opinion Filed Sept. 30, 1960.

Frank H. Schmid, Clerk.

APPENDIX B.

In the United States Court of Appeals for the Ninth Circuit.

Sunkist Growers, Inc., a corporation, and The Exchange Orange Products Company, a corporation, Appellants, v. Winckler & Smith Citrus Products Co., a corporation, and Ronald Walker, as trustee of Winckler & Smith Citrus Products Co., Appellees.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause rendered on the jury's verdict be, and hereby is affirmed, on the issue of liability, and be, and hereby is reversed and remanded on the issue of the amount of damages, with each party to bear its own costs on appeal, except that the costs of the reporter's transcript and printing of the transcript of record on appeal are to be equally borne by the parties.

(Endorsed) Judgment

Filed and entered September 30, 1960.

FRANK H. SCHMID, Clerk.

APPENDIX C.

On Petitions for Rehearing.

In the United States Court of Appeals for the Ninth Circuit.

Sunkist Growers, Inc., a Corporation, and the Exchange Orange Products Company, a Corporation, Appellants, v. Winckler & Smith Citrus Products Co., a Corporation, and Ronald Walker, Trustee, Appellees. No. 15,242.

Before: Stephens, Barnes and Merrill, Circuit Judges.

ORDER

Upon petitions for rehearing by both appellants and appellees, we modify the opinion heretofore filed as follows:

I. The balance of the first full sentence after the word "or," page 24, line 4, of slip opinion is stricken, and inserted in its place is the following:

> ". . . (2) the alleged illegal sole trader decision not to sell, made *when such refusal would, as a natural consequence,* illegally restrain trade or commerce, and implemented by other illegal means beyond the bare refusal, or (3) a similar unilateral decision not to sell, except at a fixed price, made from a monopoly position, *and resulting, as a natural consequence, in the elimination of competition.*"

II. On page 30, line 18 from top of slip opinion

The petitions for rehearing are severally denied. The suggestion for a rehearing en banc is rejected.

ALBERT LEE STEPHENS
/s/ ALBERT LEE STEPHENS
/s/ STANLEY N. BARNES
/s/ CHARLES M. MERRILL
United States Circuit Judges

(Endorsed).

Filed May 5, 1961.

FRANK H. SCHMID, Clerk.